Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

UNION ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a tax imposed by the United States on the ownership of a "particular kind of personal property" is a "direct tax" which, without apportionment among the States, is unlawful because in violation of Article I, Section 2, Clause 3 and Article I, Section 9, Clause 4 of the Constitution.

STATEMENT UNDER RULE 14.1 AND RULE 29.6

All parties to this proceeding are shown in the caption of the case. Petitioner is a wholly-owned subsidiary of Ameren Corp. No publicly held company owns ten percent or more of the stock of Ameren Corp.

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PETITION FOR A WRIT OF CERTIORARI

Union Electric Company respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 363 F.3d 1292. The opinion of the United States Court of Federal Claims (App., *infra*, 26a-35a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clause 3 of the Constitution of the United States provides, in relevant part (U.S. Const. Art. I, § 2, cl. 3):

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers * * * .

2. Article I, Section 8, Clause 1 of the Constitution of the United States provides (U.S.Const. Art. I, § 8, cl. 1):

> Duties, Imposts and Excises shall be uniform throughout the United States.

3. Article I, Section 9, Clause 4 of the Constitution of the United States provides (U.S. Const. Art. I, § 9, cl. 4):

> No Capitation, or other direct, Tax shall be laid, unless in proportion to the Census or Enumeration herein before directed to be taken.

4. The relevant provisions of Section 1101 of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2951, codified at 42 U.S.C. 2297g and 42 U.S.C. 2297g-1, are set forth in the Appendix, *infra*, at 36a-39a.

STATEMENT

On several occasions and in a variety of circumstances, this Court has held that the "direct tax" clauses of the Constitution proscribe the imposition of a federal property tax by the United States. In this case, however, the Federal Circuit leaped over these constitutional restrictions to sustain a federal tax imposed on property owned by domestic utility companies. In concluding that a federal property tax on the ownership of "particular items of property" is not a "direct tax" proscribed by the Constitution (U.S. Const. Art. I, § 9, cl. 4), the court of appeals abandoned the clearly applicable precedent of this Court and dramatically expanded the federal taxing power. Review by this Court is warranted by this serious departure from the decisions of this Court and by the practical importance of the taxes that the decision below authorizes.

1. *Background of the Enactment of the Tax.* The tax involved in this case was enacted by Congress as part of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2953 (EPACT). That statute was adopted for the purpose of discontinuing the involvement of the federal government in the atomic energy business.

a. The United States began constructing and operating uranium enrichment plants during World War II. These plants process uranium materials to enhance the portion of fissionable isotopes that they contain. They were originally operated exclusively for national defense purposes. Prior to 1970, more than 95% of the enriched uranium produced by the government was used for federal weapons programs.[1]

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[1] The facts relating to the government's uranium enrichment activities prior to 1992 are set forth in *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327, 1330-1336 (Fed. Cir. 2001) (en banc), cert. denied, 531

Beginning in 1969, however, the United States government authorized the sale of enriched uranium to public utilities for use in nuclear reactors that generate electrical power. These sales were made by the government under fixed price contracts, with the price based on the degree by which the uranium had been enriched by the government's processing. The degree of enrichment was measured by a term known as a "separative work unit" (SWU): the higher the degree of enrichment, the greater the number of SWU's contained in the processed materials.[2]

b. The United States government dominated the uranium enrichment market until the late 1970's. By 1990, however, the government's share of that market dwindled due to price competition from foreign producers. At the same time, the Department of Energy (which then operated the government's enrichment facilities) publicly disclosed that severe pollution problems had occurred during the government's operation of its enrichment facilities.[3]

In 1992, these considerations led Congress to enact legislation with two principal objectives. First, Congress decided to privatize the government's uranium enrichment business by selling its plants to private investors. To facilitate that sale, and to maximize the price realized by the

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U.S. 1096 (2002). That case, which addressed different challenges to the EPACT tax, is discussed at page 8, *infra*. In the present case, the court of appeals adopted and incorporated by reference the recitation of facts set forth in its prior opinion in *Commonwealth Edison*. App., *infra*, 2a-4a.

[2] *Commonwealth Edison*, 271 F.3d at 1331.

[3] In *Yankee Atomic Electric Co.* v. *United States*, 112 F.3d 1569, 1572 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998), the court stated that the Department of Energy did not recognize these pollution problems "until the 1980's."

government, Congress specified that the United States would retain all liabilities for the past pollution and contamination resulting from the operation of these facilities.[4]

Second, to raise money to clean up the pollution that the government had created at its facilities, Congress established a "decontamination and decommissioning" fund. 42 U.S.C. 2297g. This Fund was given two sources of revenue. First, Congress undertook to contribute future appropriations of up to $368 million per year (adjusted for inflation after 1992). See 42 U.S.C. 2297g-1(a), (d). Second, Congress imposed an annual tax of $150 million per year (adjusted for inflation after 1992) that was allocated among all of the domestic utilities that, on October 24, 1992 (the date of enactment of the legislation), owned enriched uranium materials that had been produced by the government prior to that date. 42 U.S.C. 2297g-1. This case concerns the constitutionality of that tax.

2. *How the Tax Provision Operates.* The tax involved in this case is known as the EPACT tax. The amount of the tax is $150 million per year (adjusted for inflation), and it

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[4] In the EPACT legislation, Congress established the United States Enrichment Corporation, which was chartered to take over the facilities and operate them on a "profitable and efficient basis" in order to "maximize the long-term value of the Corporation to the Treasury," and thereafter to sell the enterprise to private investors. 42 U.S.C. 2297c-2(d), 2297c-5. This plan was finalized in 1998, when the United States Enrichment Corporation was sold by the government to private investors for $1.4 billion. J.K. Glassman, *The Inside Scoop*, Washington Post (Aug. 30, 1998), at H1. Without the government's assumption of the pollution remediation costs, the government obviously would not have realized the amount that it obtained on the sale of the facilities. And, as described in the text, the government has sought to assign an even *greater* amount of its own decontamination costs -- more than $2 billion -- to public utilities under the tax challenged in this case.

continues each year through 2007 unless, prior to that date, a total tax in excess of $2.25 billion (adjusted for inflation) has already been collected. 42 U.S.C. 2297g-1(e). Each utility pays a specified fraction of each year's total assessment under a formula set forth in the statute. 42 U.S.C. 2297g-1(c). The numerator of that fraction is the amount of the enriched uranium (measured in SWUs) previously purchased by that utility from the government (or from another party who had purchased the material from the government) that the utility had *not* resold as of October 24, 1992.[5] The denominator of the fraction is the total amount of enriched uranium (measured in SWUs) that the government produced for all commercial and defense purposes prior to that same date. *Ibid.*

Under the plain text of this statute, the EPACT tax is thus imposed simply and directly on each utility based on the amount of enriched uranium that it owned on the assessment date of October 24, 1992. See note 5, *supra*. The tax is, in short, "imposed on property because of its ownership" (*Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 150 (1911)) on the assessment date.

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[5] At first blush, the statute appears to provide that the tax is to be paid by each utility only on the amount of enriched uranium it "purchased from the Department of Energy * * * before October 24, 1992." 42 U.S.C. 2297g-1(c). That general statement is then modified, however, by two further provisions. First, the statute specifies that a utility "shall be considered to have purchased" the enriched uranium from the Department if it was "produced by the Department, but purchased by the utility from another source;" second, the statute provides that a utility "shall not be considered to have purchased" the enriched uranium from the Department if it "was purchased by the utility, but sold to another" utility prior to October 24, 1992. 42 U.S.C. 2297g-1(c)(1), (2). The annual EPACT tax is thus imposed directly on each utility based on the amount of enriched uranium that each utility owned on the assessment date of October 24, 1992.

3. *Proceedings in this Case.* Petitioner Union Electric Company operates electricity-generating facilities and provides commercial and residential electrical service in Missouri and other States. As of October 24, 1992, petitioner owned enriched uranium purchased from the federal government. Petitioner was therefore subject to the EPACT tax on all of the enriched uranium that it owned on that date. 42 U.S.C. 2297g-1; see note 5, *supra*. During the period from 1992 to 2002, petitioner paid more than $14 million in ten separate annual assessments of that tax. App., *infra*, 4a.

In 1996, petitioner commenced this action to challenge the constitutionality of the EPACT tax in the Court of Federal Claims. Proceedings were stayed, however, while other cases presenting separate challenges to the tax were first addressed. App., *infra*, 4a.

4. *Other Challenges to the EPACT Tax.* a. In the first of these separate cases, the Federal Circuit addressed whether the EPACT assessments breached the fixed price contracts under which the government had sold the enriched uranium materials, by belatedly adding an additional charge or "fee" payable to the United States for precisely the same enriched materials. *Yankee Atomic Electric Co.*, 112 F.3d at 1576. The Federal Circuit concluded that the EPACT assessments did not breach the fixed price contracts because they were not imposed as additional "fees" on "only those utility companies that previously contracted with the Government." *Ibid.* Instead, the court held that the assessments were imposed as a "general tax" because they applied to any utility that, on October 24, 1992, owned uranium that had been enriched by the government *even if* that uranium had been purchased from a third-party rather than from the government directly. *Ibid.* The court stated that the use of this "general tax" to fund the correction of the "societal problem" created by the

government's pollution at its plants was a valid "general exercise of Congress's taxing power * * * rather than an act that retroactively increases the price charged to contracting parties." *Id.* at 1577.[6]

b. In the second of these prior cases, the Federal Circuit addressed whether the "general tax" thus imposed by EPACT was impermissibly retroactive. The court concluded that, even though the statute imposes assessments that apply retroactively to materials that had been purchased as many as 20 years prior to imposition of the tax, such an extraordinarily retroactive assessment does not violate due process because its "retroactive application * * * rationally furthers the legitimate legislative objective" of funding the remediation of the pollution created by the government at its uranium facilities. *Commonwealth Edison Co.*, 271 F.3d at 1330.[7]

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[6] In *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), the Court held that an unconstitutional tax on exports could not be imposed to fund harbor maintenance activities by the United States and, in doing so, rejected the government's argument that the charges at issue in that case were a permissible "fee" on the use of harbors. *Id.* at 369-370. In the litigation involving the EPACT tax, by contrast, the United States has affirmatively maintained that the EPACT assessment is *not* a retroactive "fee" for enhancement services (and therefore does not violate the contract rights of the purchasers of enriched uranium) and instead contends that the tax is "a general exercise of Congress's taxing power." *Yankee Atomic Electric Co.*, 112 F.3d at 1577; see App., *infra*, 7a-8a.

[7] In a third prior case, a panel of the Federal Circuit noted that the en banc decision in *Commonwealth Edison* "binds this panel, and requires us to reject the utilities' taking and due process arguments." *Maine Yankee Atomic Power Co.* v. *United States*, 271 F.3d 1357, 1359 (Fed. Cir. 2001), cert. denied, 535 U.S. 1095 (2002). In a concurring opinion authored by Judge Friedman, however, two members of the *Maine Yankee* panel recorded their disagreement with the reasoning and conclusion of the en banc court in *Commonwealth Edison* and concluded that the "severe" and "wholly retroactive" nature of the EPACT "denies [the utilities] due process" under the decisions of this Court. *Id.* at 1360, 1363.

5. *Decision of the Courts Below in this Case.* a. After the proceedings in these prior cases were concluded, the stay of proceedings in the present case was lifted. The Court of Federal Claims then addressed petitioner's claim that the "general tax" enacted by EPACT was an impermissible "direct tax" in violation of Article I, Section 2, Clause 3, and Article I, Section 9, Clause 4 of the Constitution. Petitioner contended that the EPACT tax was an impermissible "direct tax" because it was imposed by Congress (without apportionment among the States) directly on the ownership of property (government-enriched uranium) on the assessment date of October 24, 1992.

The Court of Federal Claims dismissed this claim without reaching its merits. The court reasoned that, although "a Direct Tax Clause challenge should be heard in an appropriate case," the court was bound in this case by the broad statement of the Federal Circuit in *Commonwealth Edison* that the EPACT tax does not violate due process and "is otherwise constitutional." App., *infra*, 34a (quoting 271 F.3d at 1357).

b. On appeal, the Federal Circuit rejected the conclusion of the Court of Federal Claims that the "direct tax" issue was foreclosed by any prior decision. The court of appeals emphasized that no prior decision had "explicitly addressed and decided" that issue, and that it therefore properly remained open for consideration. App., *infra*, 9a. The court further stated that, since the effect of the "direct tax" clause of the Constitution is a "purely legal" issue that "require[s] no fact finding by the Court of Federal Claims," it was "appropriate to decide the merits without remand." *Ibid.*

Reaching the merits, the court of appeals rejected petitioner's claims. The court stated that, "[a]lthough our

prior case law has definitively established that the EPACT special assessments are properly characterized as taxes, *Commonwealth Edison*, 271 F.3d at 1340, *Yankee Atomic*, 112 F.3d at 1575, we conclude that the EPACT tax is not a form of direct tax. Rather, the EPACT tax is an excise tax." App., *infra*, 9a.

The court noted that, in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), this Court had concluded that a "direct" federal tax could not be imposed (without apportionment among the States) on the ownership of real or personal property. The court of appeals interpreted *Pollock*, however, to stand for the proposition "that the only impermissible direct tax on personal property is a general tax on broad classes of personal property." App., *infra*, 18a. The court stated that *Pollock*, and the numerous cases that have relied on it, permit a federal tax that is "levied upon only one particular kind of personal property, [like] government-enriched uranium." *Id.* at 19a. The court therefore held that the EPACT assessment was "not a direct tax." *Ibid.*

The court stated that the EPACT assessment is instead an "excise," which is treated differently than a "direct tax" under the Constitution. Unlike a "direct tax," which must be apportioned among the States to be valid, an "excise" need only be "uniform throughout the United States." App., *infra*, 19a (quoting U.S. Const. Art. I, § 8, cl. 1). The court concluded that the EPACT tax should be regarded as an "excise" for two reasons: (i) because it "taxes consumables" and (ii) because it is "imposed on the acquisition, ownership or use" of personal property. App., *infra*, 20a-23a.

REASONS FOR GRANTING THE PETITION

The decision of the Federal Circuit tramples over an express restriction on the federal taxing power that is set forth *twice* in the Constitution. Article I, Section 2, Clause 3 and Article I, Section 9, Clause 4 of the Constitution *both* prohibit the imposition of a "direct" federal tax without apportionment of that tax among the States. This Court has repeatedly held that a federal property tax -- a tax on real or personal property "imposed by reason of ownership" -- is a "direct tax" that is proscribed by the Constitution. *Eisner* v. *Macomber*, 252 U.S. 189, 205 (1920). See, *e.g.*, *Fernandez* v. *Wiener*, 326 U.S. 340, 362 (1945) ("a direct tax * * * falls upon the owner merely because he is the owner"); *Bromley* v. *McCaughn*, 280 U.S. 124, 137 (1929) (same).

In the present case, however, the Federal Circuit ignored these decisions in holding that a tax imposed on the ownership of any "particular kind" of property should be treated as a permissible "excise" and *not* as a proscribed direct tax (App., *infra*, 19a). That decision of the Federal Circuit conflicts not only with the decisions of this Court, but also with the uniform holdings of the several circuits that have properly followed this Court's rulings. See, *e.g.*, *Simmons* v. *United States*, 308 F.2d 160, 166 (4th Cir. 1962) ("[a] direct tax is a tax on real or personal property, imposed solely by reason of its being owned by the taxpayer"); *American Nat'l Ins. Co.* v. *Commissioner*, 91 F.2d 705, 707 (5th Cir. 1937) (same).

This Court has long emphasized that the constitutional restraints on the federal taxing power are to be strictly enforced. As the Court recently explained in *United States* v. *IBM Corp.*, 517 U.S. 843 (1996), the restraints on the federal taxing powers were adopted to protect State sovereignty and "policy arguments" about the modern exigency of these

constitutional restrictions cannot supplant or displace their clear prohibitive text. *Id.* at 861. Review by this Court is warranted in this case by the failure of the court below to follow established constitutional precedents and by the high importance of the constitutional principles that the decision of the Federal Circuit has discarded. In light of the special role of the Federal Circuit in the adjudication of monetary claims against the United States, such review is also warranted by the vast sums of the unprecedented direct property taxes imposed by the EPACT assessments.

1. *A "Direct Tax" Includes A Tax Imposed On The Ownership Of Real Or Personal Property.* a. In *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. at 617-618, this Court held that a federal tax falls within the proscription of the "direct tax" clauses of the Constitution if it is imposed on either real or personal property by reason of ownership.[8] See *Brushaber* v. *Union Pacific R.R. Co.*, 240 U.S. 1, 17-19 (1916) (a federal tax is "direct" if it applies either to real or "personal property because of its ownership"). In reaching that decision, the Court relied on the clear textual distinctions in the Constitution that "divide[] Federal taxation into two great classes, the class of direct taxes, and the class of duties, imposts, and excises; and prescribe[] two rules which qualified the grant of power as to each class." 158 U.S. at 617-618. Under Article I, Section 2, Clause 3, and Article I, Section 9, Clause 4 of the Constitution, the "power to lay direct taxes" is limited to taxes that are "apportioned among the several States in proportion to their representation in the popular branch of Congress" and any effort to "lay direct

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[8] The Court in *Pollock* rejected the argument that a "direct tax" includes only a capitation or head tax on individuals and a tax on real property. The Court stated that the Constitution "forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power." 158 U.S. at 628.

taxes without apportionment was forbidden." 158 U.S. at 618. By contrast, under Article I, Section 8, Clause 1 of the Constitution, "[t]he power to lay duties, imposts and excises" is subject only to the requirement that "the imposition must be uniform throughout the United States." *Ibid.*

Giving these terms "in the Constitution * * * their natural and obvious sense," the Court held in *Pollock* that a tax is "direct" if it is levied "directly on the individual" or on his property. 158 U.S. at 619-621. By contrast, taxes that are "indirect" encompass duties "imposed on the importation, exportation or consumption of goods" and imposts and excises "levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities." *Id.* at 622.[9]

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[9] The *Pollock* case addressed the constitutionality of a federal income tax enacted before the adoption of the Sixteenth Amendment. The Court held in *Pollock* that the application of an income tax to earnings from real estate or invested capital was a proscribed "direct tax" on the ownership of such property because the constitutional proscription of a direct "tax on real and personal property" applies "equally * * * to the revenue therefrom." 158 U.S. at 630. The Court concluded in *Pollock* that, although the portions of the tax that reached income from wages or from the conduct of a trade or business were a permissible "excise" on business transactions, the tax, as a whole, was to be stricken because it was "invalid as to the greater part" of its intended scope. 158 U.S. at 635-637.

More than a decade after *Pollock* was decided, the Sixteenth Amendment was adopted to authorize Congress to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the Several States, and without regard to any census or enumeration." U.S. Const. Amdt. XVI. That Amendment did not disturb the conclusion in *Pollock* that the "direct tax" clauses restrict the imposition of federal taxes on real and "personal property because of its ownership." *Brushaber* v. *Union Pacific R.R. Co.*, 240 U.S. at 17-19. Instead, the Court has stated that the Amendment only altered the conclusion that "a direct tax on the income" is to be treated as if were "a direct tax on the source itself." *Id.* at 19. See *Eisner* v. *Macomber*, 252 U.S. at 192.

In a lengthy series of decisions that follow *Pollock* and apply its reasoning, the Court has reiterated in numerous settings that a permissible "excise" is an indirect tax imposed on a sale or other transaction or transfer involving property, but a proscribed "direct tax" is a tax that *"falls upon the owner merely because he is owner."* *Fernandez* v. *Wiener*, 326 U.S. 340, 362 (1945) (emphasis added); *Bromley* v. *McCaughn*, 280 U.S. at 137.[10] For example, in *Eisner* v. *Macomber*, 252 U.S. at 219, the Court held that a federal tax imposed on a "stock dividend" was an impermissible "direct tax" because it was "imposed by reason of ownership" and "Congress could not impose such [property] taxes without apportioning them among the States." *Id.* at 205.[11] Similarly,

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[10] In *Bromley* and *Pollock*, the Court distinguished the case of *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796), on which the court of appeals incorrectly relied in this case (App., *infra*, 11a-12a). In *Hylton*, the Court sustained a federal tax that had been imposed on carriages used for "the conveying of passengers." Act of June 5, 1794, c. 45, 1 Stat. 373. Madison and Hamilton expressed disagreement over whether that tax should have been regarded as a "direct" tax for which apportionment was required. See *Pollock*, 158 U.S. at 623-625. Each of the Justices wrote separately in *Hylton* and this Court subsequently described the case as having been "badly reported." *Id.* at 626. In *Pollock*, the Court concluded that the statute involved in *Hylton* was merely an example of an "excise, and, therefore, an indirect tax" because it was imposed on the use of carriages for the conveyance of passengers. *Id.* at 627. In *Bromley* v. *McCaughn*, 280 U.S. at 136, and again in *Fernandez* v. *Wiener*, 326 U.S. at 353, this Court made clear that the *Hylton* case involved an "excise," rather than a "direct tax," because it was imposed on "the use" of property rather than on the mere "ownership of property." *Fernandez* v. *Wiener*, 326 U.S. at 353. The court of appeals thus clearly erred in relying on *Hylton* in this case.

[11] In *Eisner* v. *Macomber*, 252 U.S. at 208-215, the Court held that a stock dividend does not represent "income" within the meaning of the Sixteenth Amendment because it represents merely a reallocation of the capital represented by the original shares. Because the stock dividend was not "income," the direct tax imposed on the ownership of those shares was unconstitutional. *Ibid.* Congress has respected the holding in *Eisner* by

the Court stated in *Helvering* v. *Independent Life Ins. Co.*, 292 U.S. 371 (1934), that a federal tax imposed on the rental value of a "building occupied by the owner" could not be sustained, "for that would be to lay a direct tax" on property merely by reason of its ownership. *Id.* at 378-379 (citing, *e.g.*, *Willcuts* v. *Bunn*, 282 U.S. 216, 227 (1930); *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288, 294 (1921)).

In short, a "direct" tax "is not a tax upon a transfer or other taxable event but is, instead, a tax upon property -- which Congress cannot exact without apportionment." *United States* v. *Manufacturers National Bank*, 363 U.S. 194, 197-198 (1960). An "excise" tax, by contrast, is a tax on a "transfer" or other transaction involving property, such as a sales or use tax or a tax imposed on the transfer of property by inheritance or gift. *Id.* at 198-199. An "excise" is "imposed upon the exercise of some of the numerous rights of property," which "is clearly distinguishable from *a direct tax, which falls upon the owner merely because he is owner, regardless of his use or disposition of the property.*" *Fernandez* v. *Wiener*, 326 U.S. at 362 (emphasis added).[12] See *Billings* v. *United*

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excepting proportionate stock dividends from the definition of "gross income" in the Internal Revenue Code. 26 U.S.C. 305(a), 305(b)(2). See *Helvering* v. *Griffiths*, 318 U.S. 371, 392 (1943).

[12] An excise may also be imposed on the gross receipts of an enterprise for the privilege of "carrying on or doing * * * business" in a particular form. *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 147 (1911). Because such an excise tax "does not impose direct taxation upon property solely because of its ownership," it does not violate the "direct tax" clauses of the Constitution. *Id.* at 150 (emphasis added):

> The Pollock Case construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the prescribed capacity, and this is made the occasion for the tax * * * . *The difference between the acts is not*

States, 232 U.S. 261, 280 (1914) (an "excise" may be imposed on "the use" of a yacht even though imposition of a "direct tax" on "mere ownership" of the same property is proscribed by the Constitution).

b. The distinctions that this Court has carefully described between permissible excises and proscribed "direct" federal property taxes have been consistently observed by the other courts of appeals. For example, in *Simmons* v. *United States*, 308 F.2d 160 (4th Cir. 1962), the court held that "[a] direct tax is a tax on real or personal property, imposed solely by reason of its being owned by the taxpayer" but that an excise imposed "upon the use of property or upon its transfer, has been considered an indirect tax, not subject to the requirement of apportionment." *Id.* at 166 (footnotes omitted). Applying that test, the court in *Simmons* upheld the validity of a federal tax on the receipt of a prize in a fishing derby, because that tax was imposed on the receipt or transfer of money and was not a direct federal tax imposed on accumulated wealth or other "property" solely "upon its ownership." *Ibid.* See also *Schenley Distillers, Inc.* v. *United States*, 255 F.2d 334, 337 (3d Cir. 1958) ("a permissible type of excise" must be levied "on more than the bare ownership of property"); *Kohl* v. *United States*, 226 F.2d 381, 384 (7th Cir. 1955) ("[a] tax imposed on property * * * only by reason of its ownership is direct * * * whereas indirect taxes are levied upon the happening of an event such as an exchange or transmission of property") (citing cases).

Indeed, prior to the decision in this case, these propositions were regarded as so well established that, in *Richardson* v. *United States*, 294 F.2d 593 (6th Cir. 1961), it was "of course,

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merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way.

conceded by the Government" that it could not impose "a tax on principal" amounts of promissory notes, for such a direct tax on property would be invalid under "well settled principles." *Id.* at 596. "It is also recognized that if the tax is actually one on principal," labeling it as an excise or some other indirect tax "will not avoid the constitutional limitation." *Ibid.*

2. *The Decision Of The Federal Circuit In This Case Conflicts With The Decisions Of This Court And The Other Courts of Appeals.* The Federal Circuit radically departed from this precedent in this case. The court initially acknowledged that the Constitution proscribes "direct" federal taxes on real and personal property. App., *infra*, 10a. The court erred, however, in stating that the decisions of this Court indicate that the constitutional proscription of "direct" federal property taxes is inapplicable when the tax is imposed only on one "particular kind of personal property, government-enriched uranium" (*id.* at 19a).

a. In numerous contexts, this Court and the other courts of appeals have consistently applied the proscriptions of the "direct tax" clauses to taxes imposed on one "particular kind of property" or another. For example, in *Eisner* v. *Macomber*, 252 U.S. at 219, this Court struck a "direct tax" imposed solely on a stock dividend; in *Helvering* v. *Independent Life Ins. Co.*, 292 U.S. at 378-379, the Court held that a tax imposed "on the part of the building occupied by the owner or upon the rental value of that space" would be an impermissible "direct tax;" and in *Billings* v. *United States*, 232 U.S. at 280, the Court stated that, while a "direct tax" could *not* be imposed on "mere ownership" of a yacht. an excise tax could be imposed on the "use" of that property by the owner or charter party. The ruling of the court below that a tax is not a "direct" tax if it is imposed on the ownership of

only one "particular kind" of property plainly conflicts with these decisions. See also cases cited at pages 14-17, *supra*.

b. The court below clearly erred in suggesting that in *Pollock* the Court adopted the argument pressed by Alexander Hamilton as counsel in *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796), that the direct tax clauses proscribe only a general property tax and do not proscribe a tax on the ownership of "particular items" of property. App., *infra*, 16a-17a. The Court in *Pollock* expressly distinguished *Hylton* as a case involving "an excise, and, therefore, an indirect tax" on the *use* of carriages rather than a direct tax imposed on the *ownership* of that property. 158 U.S. at 627. See *Bromley* v. *McCaughn*, 280 U.S. at 136 ("a tax imposed upon a particular use of property * * * is an excise which need not be apportioned") (citing *Hylton* v. *United States*, *supra*); *Brushaber* v. *Union Pacific R.R. Co.*, 240 U.S. at 17-19; note 10, *supra*.

Moreover, in *Pollock*, the Court noted that, while the views of Hamilton conflicted with the views of Madison (as well as those of other participants in the constitutional debates), *even under Hamilton's view*, a "direct tax" includes a tax on the "whole property of individuals, or on their whole real or personal estate." 158 U.S. at 625.[13] Recognizing that

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[13] Recent scholarship has comprehensively described the separate views of the Founders concerning the direct tax clauses. Those separate views generally reflect individual perspectives rather than collegial conclusions. See, *e.g.*, E. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional*, 97 Colum. L. Rev. 2334, 2377-2389 (1997); C. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 Wm. & Mary Bill of Rts J. 1, 12-24 (1998). The authors of these articles conclude that the Founders viewed the term "direct tax" broadly, and Johnson expresses the view that the term was intended by the Founders to apply to all taxes except customs duties (although he advocates a narrower construction). C. Johnson, *supra*, 7 Wm. & Mary Bill of Rts J. at 1. See also E. Jensen, *supra*, at 2338.

Hamilton's views as counsel in *Hylton* "must be regarded as the liberty which the advocate usually thinks himself entitled to take with his subject," the Court simply noted that, in light of the breadth of the income tax that was at issue in *Pollock*, the views of Hamilton were in any event not inconsistent with its decision in that case. *Ibid.*

Since *Pollock*, neither this Court nor any other court has adopted (or even referred to) the views espoused by Hamilton as an "advocate" in the *Hylton* case. Instead, as noted above, courts have consistently and properly applied the "direct tax" clauses to proscribe taxes imposed on the ownership of quite discrete "particular kinds of personal property." By attempting to resuscitate the discarded Hamiltonian view, the contrary determination of the Federal Circuit in this case directly conflicts with this large body of precedent.

c. The narrow understanding of the "direct tax" clauses adopted by the Federal Circuit also has no support in logic. If it were true (as the court of appeals asserts) that the Constitution proscribes an unapportioned federal property tax on the "whole" of one's property but does not proscribe such a tax imposed "upon only one particular kind" of property (App., *infra*, 16a, 19a), the constitutional proscription would be unenforceable. Through the simple guise of enacting a multiple set of individual federal property taxes to reach the desired accumulation of property subject to tax, the restrictions of the "direct tax" clauses would be avoided by the Federal Circuit decision.

Such a strange and ineffective rule has no basis in the text or history of the "direct tax" clauses. Instead, as the Court emphasized in *Pollock*, the "direct tax" clauses are part of the "complex system of government, * * * sagaciously framed to secure and perpetuate 'an indestructible Union, composed of

indestructible States.'" 158 U.S. at 617. The court explained that (*id.* at 620) (emphasis added):

> The reasons for the clauses of the Constitution in respect of direct taxation are not far to seek. *The States*, respectively, possessed plenary powers of taxation. They *could tax the property of their citizens in such manner and to such extent as they saw fit* * * *. *They retained the power of direct taxation*, and to that they looked as their chief resource; but even in respect of that, they granted the concurrent power [to the federal government] * * *. *The founders anticipated that the expenditures of the States, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property*, while *they expected that those of the Federal government would be for the most part met by indirect taxes*. And, in order that the power of direct taxation by the general government should not be exercised, except on necessity; and, * * * should not be so exercised unfairly and discriminatingly, as to particular States or otherwise, * * * the qualified grant was made.

Indeed, as the Court noted in *Pollock*, the constitutional clauses that limit "direct" federal taxation of property "merely because of ownership" were "deemed so important" that they are "enforced by two provisions, one affirmative and one negative." 158 U.S. at 627-628. By permitting such facile avoidance of the proscriptions of these clauses in this case, the decision of the court of appeals plainly fails to comply with the direction of this Court that the "direct tax" clauses be "taken in their obvious sense" and given "a reasonable construction." *Id.* at 618.

d. The court of appeals particularly erred in asserting that the decisions issued by this Court after *Pollock* "repeatedly

sustained unapportioned taxes on particular items of personal property that fell short of general taxes on the whole of one's property." App., *infra*, 18a. That assertion is flatly wrong. Each of the cases cited by the court of appeals in fact concluded that, while a direct federal tax may *not* be imposed on the ownership of a particular type of property, an excise tax may properly be imposed on a "transaction" or "transfer" involving such property.

For example, in *Fernandez* v. *Wiener*, 326 U.S. at 361-362 (cited by the court of appeals at App., *infra*, 18a), this Court held that the federal estate tax is an "excise tax" based on the transfer of "some of the incidents of property" at death, which "is clearly distinguishable from a direct tax, which falls upon the owner merely because he is owner, regardless of his use or disposition of the property." Exactly that same distinction between permissible excises and proscribed direct taxes is made in *each* of the decisions of this Court on which the court of appeals erroneously relied in this case.[14] See, *e.g.*, *Bromley* v. *McCaughn*, 280 U.S. at 138 (federal gift tax is an excise tax on the transfer of property rather than a proscribed "direct tax" that "falls upon the owner merely because he is the owner, regardless of the use or disposition made of his property"); *N.Y. Trust Co.* v. *Eisner*, 256 U.S. 345 (1921) (federal estate tax is an excise on the transfer of property at death); *Billings* v. *United States*, 232 U.S. at 279 (tax on "the

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[14] The "persistence of this distinction and the justification for it rest upon the historic fact that [excise] taxes * * * were not understood to be direct taxes when the Constitution was adopted." *Bromley* v. *McCaughn*, 280 U.S. at 137. This distinction is also made necessary by the separate treatment provided to these different taxes in Article I, Section 8, Clause 1 (which requires that all duties, imposts and excises be at uniform rates) and Article I, Section 2, Clause 3 and Article I, Section 9, Clause 4 (which require that all direct taxes instead be apportioned among the States according to population). See *Pollock*, 158 U.S. at 618; *Simmons* v. *United States*, 308 F.2d at 167.

use" of a yacht is an excise and not a direct tax on its ownership); *Spreckles Sugar Ref. Co.* v. *McClain*, 192 U.S. 397 (1904) (excise tax on manufacture of goods is on the privilege of conducting business). None of the cases cited by the court of appeals even arguably provides any support for its assertion that, following *Pollock*, this Court approved direct taxes "on particular items of personal property" (App., *infra*, 18a).

e. In the face of this clear precedent, the court of appeals also plainly erred in stating that the EPACT tax on the ownership of "government-enriched uranium" is a permissible "excise" tax (App., *infra*, 19a). The court offered two theories for that holding, both of which conflict with the decisions of this Court.

(i) First, the court suggested that the EPACT tax could be sustained as an excise simply because it falls on an item of property (government-enriched uranium) that could be characterized as a "consumable." There is no support for the proposition that a proscribed "direct tax" imposed "merely on the ownership" of personal property is to be treated as a permissible "excise" if that property is capable of being consumed. To the contrary, this Court has clearly held that "[t]o levy a tax by reason of ownership of property is to tax the property" and that a tax that applies to the ownership of consumable property (such as whiskey held in inventory) cannot be made into an indirect excise "tax by calling it so." *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U.S. at 294. See also *Schenley Distilleries, Inc.* v. *United States*, 255 F.2d at 337 (a tax on the *manufacture* of whiskey is "a permissible type of excise" for it is levied "on more than the bare ownership of property").

In support of its theory that a tax on the ownership of a "consumable" is necessarily an excise, the court below again

incorrectly sought to rely on the *Hylton* case (App., *infra*, 20a). This Court has explained that *Hylton* stands for the entirely different proposition that a tax on the "use" of property, or on "the exercise of a single power over property incidental to ownership, is an excise." *Bromley* v. *McCaughn*, 280 U.S. at 136. In contrast, "a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his property" is a direct tax. *Id.* at 137. See note 10, *supra*.

The court below also erred in citing *Patton* v. *Brady*, 184 U.S. 608, 617 (1902), for the proposition that a tax on the ownership of consumables is an "excise" (App., *infra*, 20a). That case merely applied the settled principle that a tax on the manufacture and sale of a good is an excise tax. A sales tax, which is perhaps the most common excise tax, is levied on the *transfer* or *sale* of property, not on its mere ownership. Indeed, in *Patton*, this Court emphasized this distinction between an excise tax on sales of property and a direct tax imposed on such property "as property," for which the separate "constitutional limitations as to the mode of taxing property" apply. 184 U.S. at 622. The court of appeals plainly erred in failing to honor that distinction in this case.

(ii) The court of appeals also erred in stating that the EPACT tax could be treated as an excise on the theory that it is imposed on "the purchase" or "acquisition" of enriched uranium "as opposed to the mere ownership of property" (App., *infra*, 22a). That description of the tax is simply wrong. The EPACT tax is not imposed as a "sales" tax on purchases of enriched uranium, for it does not apply to *any* sale (much less to *all* sales) of such materials. Instead, it applies by its express terms only to the utilities that *owned* government-enriched uranium materials on the assessment

date of October 24, 1992.[15] The obvious character of any direct tax assessed "merely by reason of ownership" is that it is assessed on individuals who (at some earlier time) acquired such property and who (as of the assessment date) still own it. As explained above, the EPACT tax applies precisely and exclusively in that manner. See note 5, *supra*. And, as this Court stated in rejecting a similar effort to relabel exactions in *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U.S. at 294, a direct tax imposed on property "by reason of ownership" cannot be made into an indirect tax "by calling it so."

Unlike an excise tax, the EPACT does not apply to any transfer, sale or use of property. Instead, as the court below ultimately appears to acknowledge, the tax "here [is] on the ownership" of "a particular kind of personal property" on the assessment date (App., *infra*, 20a, 24a). As this Court held in *Fernandez* v. *Wiener*, 326 U.S. at 352, 362, while an "excise" may be levied "upon a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property," an excise does *not* include a tax that falls on the owner "merely because he is owner." The extraordinary assertion of the court of appeals at the conclusion of its opinion that a permissible "excise" includes a tax imposed on the "ownership" of a particular kind of property (App., *infra*, 24a) manifestly conflicts with the decisions of this Court and the other courts of appeals.

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[15] If the utility that purchased enriched uranium sold it to another utility before October 24, 1992, the first purchaser pays no tax; only the owner of the property on the assessment date of October 24, 1992, pays the tax. See note 5, *supra*. Like an ordinary property tax, the EPACT is imposed annually based on the ownership of the property on a specific date (*ibid.*), whereas an excise or sales tax applies to specific transfers or uses of the property. See *Bromley* v. *McCaughn*, 280 U.S. at 136; note 11, *supra*.

3. Because the Federal Circuit has a special status in the adjudication of monetary claims involving the United States, this Court has often noted the need for plenary review of decisions of that circuit of significant fiscal importance. See, *e.g.*, *United States* v. *IBM Corp.*, 533 U.S. at 846; *United States* v. *Hill*, 506 U.S. 546, 549 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). In light of the important constitutional issues presented by the decision below, and the enormous magnitude (and extreme retroactivity) of the direct federal property tax involved in this case, such review is appropriate in this case.

a. The decision below would drastically alter the constitutional limitations on the federal taxing power. This Court has held that the fundamental constitutional restrictions on the federal taxing power contained in the "direct tax" clauses of Article I proscribe an unapportioned direct federal tax "on the ownership of property." By permitting a direct federal property tax on the ownership of a "particular kind of personal property" (App., *infra*, 19a), the decision below represents more than an incidental erosion of these constitutional principles. It is instead a rejection and nullification of them.

This nullification of constitutional principles interferes with the traditional State authority over property taxation that the Constitution seeks to protect. It also cedes to Congress a new taxing power that the Founders deliberately and expressly sought to restrain. In Article I, Section 9 of the Constitution, the Founders adopted three separate restrictions on the federal taxing power -- the direct tax clause, the export clause and the port preference clause. U.S. Const. Art. I, §9, cls. 4, 5, 6. The central purpose of these constitutional restrictions on federal taxation is to protect State sovereignty over traditional methods of raising revenue and to "diffus[e]

sectional conflicts" that might result from federal intrusion into that domain. *United States* v. *IBM Corp.*, 517 U.S. at 860. "The founders anticipated that the expenditures of the States, their counties, cities and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the Federal government would be for the most part met by indirect taxes." *Pollock*, 158 U.S. at 621. The restrictions of the "direct tax" clause were adopted "in order that the power of direct taxation by the general government should not be exercised, except on necessity * * * ." *Ibid.*

The concern of the Founders that a direct federal tax on the ownership of property could inflate sectional rivalries related to the possibility that a direct tax might be imposed on only one particular kind of property (such as tobacco, pineapples or real estate) that happened to be more prevalent in some regions of the Nation than in others. Such a tax would obviously disadvantage the States that possessed such property in relative abundance, and the direct tax clauses were designed to prevent such a tax from being imposed "unfairly and discriminatingly" to the disadvantage of particular States. *Pollock*, 158 U.S. at 621; E. Jensen, supra, 97 Colum. L. Rev. at 2387.[16] The holding of the court below that a "direct tax" does *not* include a federal tax imposed on the ownership of a "particular kind" of property (App., *infra*, 19a) would thus squarely defeat the central objectives of these constitutional provisions.

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[16] Indeed, at the hearings that led to the enactment of the EPACT assessment, a Representative from a State that was "heavily dependent on nuclear energy" objected to the EPACT tax as "terribly unfair" because "those States that are more nuclear dependent will bear a much heavier burden of this tax." Hearings Before the House Committee on Ways and Means on the Comprehensive National Energy Policy Act, 102d Cong., 2d Sess. 79 (Apr. 28, 1992) (Serial 102-94).

b. This Court has repeatedly rejected "policy" arguments proffered by the federal government as justifications for evading the textual limitations on the federal taxing power in the Constitution. See *United States* v. *IBM Corp.*, 517 U.S. at 861. There is, in any event, no need to resort to "policy" discussions to resolve the issues presented in this case. There is no doubt that Congress *has* the power to remedy the pollution that the government caused at its uranium enrichment facilities. There is also no doubt that, through some *lawful* measure that does not abridge constitutional proscriptions, Congress could raise funds for that purpose. But this Court's decisions make clear that -- no matter how worthy the purpose -- Congress may not fund the costs of its programs through the imposition of unconstitutional taxes. *United States* v. *IBM Corp.*, 517 U.S. at 861. See also *United States* v. *United States Shoe Corp.*, 523 U.S. at 370; note 6, *supra*. That, however, is precisely the course taken by Congress in the EPACT.

Because the decision of the court of appeals conflicts with the decisions of this Court and other courts of appeals and, in doing so, broadly sanctions the imposition of unconstitutional federal property taxes that have an enormous fiscal effect, review of this unprecedented decision is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

[April 2, 2004]

03-5096

UNION ELECTRIC COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Before CLEVENGER, RADER and DYK, *Circuit Judges*.

DYK, *Circuit Judge*.

This case presents, once again, questions concerning the constitutionality of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified as amended in various sections of 42 U.S.C.) ("EPACT"). EPACT imposes special monetary assessments on domestic utility companies that have purchased government-enriched uranium for the purpose of commercial electricity generation. 42 U.S.C. § 2297g-1(c) (2000). In three previous decisions we rejected claims for recovery of EPACT assessments based on theories that (a) the assessments violated prior contracts between the utilities and the government and constituted takings of those contract

rights, *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569 (Fed. Cir. 1997), *cert. denied*, 524 U.S. 951 (1998); (b) the assessments constituted takings or violated due process under the Fifth Amendment, *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001) (*en banc*), *cert. denied*, 535 U.S. 1096 (2002); and (c) the assessments violated the equal protection component of the Due Process Clause, *Maine Yankee Atomic Power Co. v. United States*, 271 F.3d 1357 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1095 (2002). This case presents the question whether the assessments constitute unconstitutionally unapportioned direct taxes. This issue was raised in passing in *Maine Yankee*, but we did not address it in deciding the case. We hold that stare decisis does not foreclose our review of the direct tax question, but on the merits we hold that the EPACT special assessments are not direct taxes and do not therefore require apportionment in accordance with the Direct Tax Clauses of the Constitution, U.S. Const. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 4. We therefore affirm the Court of Federal Claims' decision in *Union Elec. Co. v. United States*, No. 96-674C, slip op. at 6-7 (Fed. Cl. Jan. 30, 2003).

BACKGROUND

We have considered in detail the history and purpose of EPACT in our prior cases. *See Yankee Atomic*, 112 F.3d at 1572-73; *Commonwealth Edison*, 271 F.3d at 1332-34; *Maine Yankee*, 271 F.3d at 1360-61 (Friedman, J., concurring). Suffice it to say for present purposes that "Congress in EPACT addressed the need to decontaminate and decommission the government's uranium enrichment facilities . . . the costs [of which] were to be shared by the government and those domestic utilities that benefited from processing [of uranium] at government facilities." *Commonwealth Edison*, 271 F.3d at 1333. The Act provided that, to this end, "a special assessment [would be collected] from domestic utilities" that "purchased

[enriched uranium] from the Department of Energy for the purpose of commercial electricity generation, before October 24, 1992." 42 U.S.C. § 2297g-1(c).[2]

The special assessment imposed on a particular utility was based on the percentage of the total number of government-produced separative work units ("SWU") (the measurement unit used to quantify government enrichment services) that the utility purchased.[3] The Act further explained that "a utility shall be considered to have purchased a separative work unit from the Department if [it] was produced by the Department, but purchased by the utility from another source" as long as the utility had not resold the government-enriched uranium before October 24, 1992. *Id.* § 2297g-1(c)(1)-(2). In other words, as to those utilities that submitted the uranium to the government for processing, the tax was effectively imposed on their utilization of the government enrichment services. *See Commonwealth Edison*, 271 F.3d at 1333. With respect to

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[2]The statute addressing special assessments reads:

> The Secretary shall collect a special assessment from domestic utilities. The total amount collected for a fiscal year shall not exceed $150,000,000 . . . . The amount collected from each utility . . . for a fiscal year shall be in the ratio . . . as the total amount of separative work units such utility has *purchased from the Department of Energy for the purpose of commercial electricity generation,* before October 24, 1992, bears to the total amount of separative work units purchased from the Department of Energy for all purposes . . . before October 24, 1992.

42 U.S.C. § 2297g-1(c) (emphasis added).

[3]An SWU measures "the amount of energy required for the enrichment of each utility's uranium." *Fla. Power & Light Co. v. United States*, 307 F.3d 1364, 1372 (Fed. Cir. 2002).

companies that purchased already-enriched uranium from those that had utilized the government enrichment services, the tax was effectively imposed on their purchase of the enriched uranium. The net effect of the statute was to tax domestic utility purchasers, but it did not apply to (1) foreign utility purchasers of government-enriched uranium; (2) domestic utilities that purchased enriched uranium from foreign sources; (3) domestic utilities that sold their government-enriched uranium prior to October 24, 1992; and (4) domestic utilities that purchased government-enriched uranium after October 24, 1992. *See id.* Finally, EPACT specified that the collection of special assessments would cease after "the earlier of . . . 15 years after October 24, 1992; or . . . the collection of $2,250,000,000." 42 U.S.C. § 2297g-1(e).

The relevant facts in this case are not in dispute. Union Electric is a Missouri corporation that operates various electricity-generating facilities. Prior to October 24, 1992, Union Electric owned government-enriched uranium that it had purchased both directly from the government and on the secondary market. Union Electric was liable for special assessments under EPACT, and it paid a total of $14,436,240.51 in special assessments as of the date the complaint was filed. In October of 1996 Union Electric filed a complaint in the Court of Federal Claims, claiming that it was entitled to a refund of these EPACT special assessments on a variety of theories. The Court of Federal Claims stayed the proceedings in Union Electric's case pending the outcomes in *Yankee Atomic*, *Commonwealth Edison*, and *Maine Yankee*.

Following our resolution of these three cases, Union Electric filed an amended complaint in the Court of Federal Claims, where it asserted seven grounds for invalidation of the EPACT special assessments, including a claim that the special assessments violated the Direct Tax Clauses of the

Constitution.[4] Union Electric claimed that the EPACT special assessments were direct taxes and therefore unconstitutional because they were not apportioned as required by sections 2 and 9 of Article I. The government filed a motion to dismiss, and the Court of Federal Claims dismissed the complaint in its entirety, finding that all the claims were governed by our court's opinions in *Yankee Atomic, Commonwealth Edison*, and *Maine Yankee*.[5] The Court of Federal Claims held that stare decisis barred it from deciding the direct tax claim even though it had not been explicitly decided in the prior opinions. The court stated:

> It is true that no Federal Circuit decision has unambiguously announced a ruling denying the

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[4]The relevant constitutional provisions read as follows:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .

U.S. Const., art. I, § 2, cl. 3.

> No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

Id. art. I, § 9, cl. 4.

> Duties, Imposts and Excises shall be uniform throughout the United States.

Id. art. I, § 8, cl. 1.

[5] Union Electric's complaint also raised a claim that the EPACT tax violated the Ex Post Facto Clause of the Constitution. The Court of Federal Claims rejected this claim based on the Supreme Court's decision in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). *Union Elec.*, slip op. at 4.

> unapportioned direct tax claim argued by plaintiffs. The [EPACT special assessments] litigation, however, has encompassed dozens of lawsuits, offering a spectrum of constitutional arguments against EPACT. Those arguments, including the direct tax challenge at issue here, were heard in turn by the Federal Circuit which did not regard the issue as dispositive. It cannot be assumed that the Federal Circuit has chosen to base the resolution of this complicated litigation on an unconstitutional act . . . . This court holds that a better reading of *Commonwealth Edison, Yankee Atomic*, and *Maine Yankee* forecloses any suit predicated on an unapportioned direct tax challenge.

Union Elec., slip op. at 6-7.

Union Electric appeals the dismissal of its direct tax claim. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review the Court of Federal Claims' dismissal without deference. *See First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1286-87 (Fed. Cir. 1999).

I

The first question we address is whether consideration of the direct tax issue is foreclosed by our earlier decisions. We hold that it is not.

The Court of Federal Claims declined to consider the direct tax challenge, finding that it was implicitly decided by our earlier EPACT decisions because the "[Federal Circuit] court

grounded its approval of EPACT assessments on the theory that those assessments are taxes . . . . It is indeed untenable to assert that the court would issue that holding without simultaneously considering whether such taxes are constitutional." *Union Elec.*, slip op. at 6. However, the direct tax issue was not specifically argued in *Yankee Atomic* or *Commonwealth Edison.*

In *Yankee Atomic* we considered whether the EPACT tax breached the domestic utilities' contracts with the government by "retroactively increasing the price [of] previously supplied uranium enrichment services," 112 F.3d at 1573, and whether the assessments constituted takings of the utilities' contract rights, *see id.* at 1580 n.8. We held that the special assessments did not breach domestic utilities' prior contracts with the government because these contracts "did not include an unmistakable promise that precluded the Government from later imposing an assessment upon all domestic utilities that employed the DOE's uranium enrichment services." *Id.* at 1580. We also concluded that Yankee Atomic's takings claim failed because the lack of an "unmistakable promise" against future assessments meant that "Yankee Atomic had no property right (via a vested contract right) which was subsequently taken by the assessment." *Id.* at 1580 n.8.

So too, we affirmed the constitutionality of the EPACT assessments in our en banc decision in *Commonwealth Edison* without considering the direct tax issue. The tax was challenged as violating Edison's contracts with the government as well as the Takings Clause and the Due Process Clause of the Fifth Amendment. We rejected Edison's contract claims, relying on *Yankee Atomic*. *Commonwealth Edison*, 271 F.3d at 1341. We held that the special assessments did "not constitute a Fifth Amendment taking because the Takings Clause does not apply to legislation requiring the payment of money." *Id.* at 1329. Finally, we held that the EPACT tax did

not violate the Due Process Clause despite its retroactive effect because the retroactive character of the tax furthered the "legitimate legislative objective" to decontaminate uranium processing facilities; because Congress' findings that domestic utilities had benefited from the enrichment services and had contributed to the contamination were reasonable conclusions; because Congress did not impose the entire decontamination costs on the domestic utilities; and because the domestic utilities "could have reasonably expected" to incur liability for the government's decontamination costs. *Id.* at 1330.

In *Maine Yankee* we again upheld the constitutionality of the EPACT assessments. We held that the EPACT assessments did not violate the Equal Protection Clause, rejecting the utility companies' argument that the foreign utility exemption of the statute unconstitutionally disadvantaged them. *Maine Yankee*, 271 F.3d at 1359. Although the direct tax issue was raised as a ground for appeal in *Maine Yankee*, it was not addressed in our opinion, and there is a question as to whether the argument was properly raised in the Court of Federal Claims. [6] *See Union Elec.*, slip op. at 6.

Even if *Maine Yankee* were viewed as implicitly rejecting the direct tax argument, we have repeatedly held that the

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[6] The complaint did not raise the direct tax issue. At oral argument in the Court of Federal Claims, counsel for the appellant, Sacramento Municipal Utility District, appeared to admit that the issue had not been properly raised. He suggested the direct tax argument at oral argument in the Court of Federal Claims and explained: "I'm reluctant to thrust this on the Court because it's a little half-baked. We haven't had a chance to brief it to the Court and we're catching [Government counsel] by surprise, and I apologize for that." Oral Argument Transcript, *Maine Yankee*, Nos. 97-28C, 95-823C, 96-616C, at 82 (Fed. Cl. May 18, 1999).

disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue. *See, e.g., Boeing N. Am., Inc. v. Roche*, 298 F.3d 1274, 1282 (Fed. Cir. 2002). Supreme Court precedent also supports this limitation on stare decisis. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 n.6 (1995) ("[T]he unexplained silences of our decisions lack precedential weight."); *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (holding that stare decisis did not apply, and the Court was "free to address the issue on the merits" because its prior case law "never squarely addressed the issue, and at most assumed the applicability of the . . . standard" in question).

In the circumstances of this case, we conclude that it is appropriate to decide the merits without remand. The issues are purely legal and require no fact-finding by the Court of Federal Claims. Both parties urge us to decide on the merits, and having received briefing and argument on the constitutional question, it will conserve judicial resources to decide the merits at this time. Thus, this panel will address Union Electric's direct tax challenge on the merits.

II

Although our prior case law has definitively established that the EPACT special assessments are properly characterized as taxes, *Commonwealth Edison*, 271 F.3d at 1340, *Yankee Atomic*, 112 F.3d at 1575, we conclude that the EPACT tax is not a form of direct tax. Rather, the EPACT tax is an excise tax.

The direct tax provisions appear in Article I of the Constitution. Section 2, clause 3 provides that "direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers." U.S. Const., art. I, § 2, cl. 3. In section 9, clause 4,

the Constitution elaborates on the direct tax requirements, explaining that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." *Id.* art. I, § 9, cl. 4. The Constitution treats excise taxes differently, stating that "Duties, Imposts and Excises shall be uniform throughout the United States." *Id.* art. I, § 8, cl. 1. Neither the record of the constitutional convention nor the state ratification debates defines with any clarity the meaning of the term "direct tax" in the context of personal property. *See* Bruce Ackerman, *Taxation & the Constitution*, 99 Colum. L. Rev. 1, 9-11 (1999); *see also* 2 *The Records of the Federal Convention of 1787*, at 350 (Max Farrand ed., Yale Univ. Press, 1966) (Aug. 20, 1787) ("Mr. King [a delegate to the constitutional convention] asked what was the precise meaning of direct taxation? No one answ[ere]d."). Over the years, litigants have frequently challenged specific taxes as unapportioned direct taxes in violation of Article I, sections 2 and 9. The Constitution's contrast of direct taxes with excise taxes has generally provided the framework for constitutional analysis in this area.[7]

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[7] Supreme Court decisions have recognized, however, that there may be indirect taxes that are not excise taxes. For example, Justice Chase stated in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796):

> If there are any other species of taxes that are not direct, and not included within the words duties, imposts, or excises, they may be laid by the rule of uniformity or not, as congress shall think proper and reasonable. If the framers of the constitution did not contemplate other taxes than direct taxes, and duties, imposts and excises, there is a great inaccuracy in their language. If these four species of taxes were all that were meditated, the general power to lay taxes was unnecessary.

Id. at 173.

The first direct tax case to come before the Supreme Court was *Hylton*, which upheld an unapportioned tax on carriages. 3 U.S. (3 Dall.) at 171. The statute at issue in *Hylton*, Act of June 5, 1794, ch. 45, 1 Stat. 373 (repealed 1796), imposed a tax "upon all carriages for the conveyance of persons, which shall be kept by or for any person, for his or her own use, or to be let out to hire, or for the conveying of passengers." *Id.* at 373-74. The Court rejected the plaintiff's challenge to the carriage tax as an unapportioned direct tax, holding that the carriage tax was indirect. *Hylton*, however, was not entirely clear as to the standard to be used in distinguishing direct taxes from indirect taxes. Three Justices participated in the decision, each writing a separate opinion. Justice Chase declined to "give a judicial opinion" as to what was encompassed in the category of direct taxes, but he expressed his inclination "that the direct taxes contemplated by the constitution, are only two, to wit, a capitation or poll tax . . . and a tax on land." 3 U.S. (3 Dall.) at 175. Justice Chase further explained that a tax on "a consumable commodity . . . is on the expense of the owner," and therefore should be considered an indirect tax. *Id.* Justice Paterson also declined to decide "[w]hether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax, and a tax on land," *id.* at 177, but he affirmatively stated that "[a]ll taxes on expenses or consumption are indirect taxes," *id.* at 180. Justice Iredell noted that "[p]erhaps a direct tax, in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil, something capable of apportionment under all such circumstances. A land or a poll tax may be considered of this description . . . . In regard to other articles, there may possibly be considerable doubt." *Id.* at 183. Declining to decide the precise parameters of a direct tax, Justice Iredell concluded that "[i]t is sufficient, on the present occasion, for the court to be satisfied that this is not a direct tax," *id.* at 183, because it would have been "manifestly

absurd" to apportion the carriage tax, *id.* at 182. Each of the three Justices that wrote an individual opinion, Justice Chase, Justice Paterson, and Justice Iredell, concluded that a rule of apportionment with respect to the carriage tax would be impractical and "create great inequality and injustice" because the number of carriages in a state did not necessarily correlate to the state's population. *Id.* at 174; *see also id.* at 179; *id.* at 183. Though Justice Wilson, writing separately, stated that he found it unnecessary to participate in the decision, he agreed that the tax was constitutional without providing his reasons. *Id.* at 183-84.

The Court has never overruled *Hylton*. In fact, in the years since *Hylton*, the Supreme Court has repeatedly cited *Hylton* with approval in rejecting direct tax challenges. *See, e.g., Fernandez v. Wiener*, 326 U.S. 340, 353 (1945); *Bromley v. McCaughn*, 280 U.S. 124, 136 (1929); *Thomas v. United States*, 192 U.S. 363, 370 (1904); *Springer v. United States*, 102 U.S. 586, 599-601 (1880).

III

The appellant places its primary reliance on the Supreme Court decisions in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) ("*Pollock I*"), and *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) ("*Pollock II*"), which invalidated an income tax on the ground that it was an unapportioned direct tax under the federal Constitution.[8]

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[8] The appellant also cites *Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U.S 288 (1921), as an instance where the Court struck down a tax as an unconstitutional direct tax. This decision, however, has no bearing on the present case because *Dawson* related to a state tax challenged on state constitutional grounds. *See id.* at 292. The state tax at issue in *Dawson* imposed an "annual license tax of fifty cents a gallon upon all whiskey either withdrawn from bond or transferred in bond from Kentucky to a point outside that State." *Id.* at 289 (quoting Act of Mar. 12, 1920, ch. 13).

Pollock came twice before the Court. Initially, in *Pollock I* the Court invalidated an income tax insofar as it was a tax upon the income from real property. 157 U.S. at 583. The Court held that it was a direct tax because a tax on the real property itself would have been a direct tax. *See id.* at 580-81. But the Court was equally divided as to whether a tax on the income from personal property also constituted a direct tax. *See id.* at 586. On rehearing in *Pollock II* the Court held that the same income tax was an invalid direct tax insofar as it taxed the income of personal property. 158 U.S. at 637.

The appellant admits that the Sixteenth Amendment overruled the *Pollock* decisions (collectively "*Pollock*") in part by explicitly authorizing a federal income tax "on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration," U.S. Const. amend. XVI; *see also Utah v. Evans*, 536 U.S. 452, 492 n.2 (2002) (Thomas, J., concurring), but the appellant argues that *Pollock* stands more broadly for

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The Kentucky Constitution distinguished between property taxes and occupation taxes, requiring the former to be "uniform upon all property of the same class subject to taxation." *Id.* at 291(quoting Ky. Const. § 171); *see also* Ky. Const. § 171 ("Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax") and 181 ("The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax . . . ."). The Court considered "whether as to such this fifty cents a gallon tax is an occupation tax or is a property tax" under the Kentucky Constitution, holding the tax to be on the property of whiskey and therefore invalid because not uniform. *Dawson*, 255 U.S. at 292-94. In determining, however, that the tax was one on property, the Court did not consider whether the tax was direct or indirect because this distinction was not the basis of the challenge to the tax under the Kentucky Constitution.

the proposition that any tax on the ownership of either personal or real property itself is direct and must be apportioned. The appellant further argues that because the Supreme Court has never specifically overruled the direct tax holding of *Pollock*, we must invalidate the EPACT special assessments based on the reasoning in *Pollock*. We agree that *Pollock* has never been overruled, though its reasoning appears to have been discredited.[9] Nonetheless, we are obligated to follow *Pollock* until it is explicitly overruled by the Supreme Court. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). However, we do not think that *Pollock* stands for the proposition that the appellant urges or that the EPACT special assessments fall within *Pollock*'s definition of direct taxes. In view of the centrality of *Pollock* to the appellant's argument, we must consider *Pollock* at length.

In *Pollock I* the Supreme Court confronted a federal income tax for the years 1895-1900 "upon the gains, profits, and income received in the preceding calendar year by every

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[9] While some earlier cases appeared to approve of the reasoning in *Pollock*, *see Thomas*, 192 U.S. at 370; *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 16-19 (1916), the Supreme Court seemed to disapprove of the reasoning that an income tax on proceeds from the use of land was equivalent to a tax on the land itself in its 1937 *N.Y. ex rel. Cohn v. Graves*, 300 U.S. 308, 315 (1937), decision. This reasoning would seem to apply to a tax on the proceeds from personal property. *See also* Ackerman, 99 Colum. L. Rev. at 51 (suggesting that the Supreme Court's Sixteenth Amendment jurisprudence indicates that *Pollock*'s "teachings on the scope of the 'direct tax' clauses should be dispatched into the dustbin of constitutional history"); *but see* Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional*, 97 Colum. L. Rev. 2334, 2345 (1997) ("A repudiation of *Pollock* is at most a rejection of the Courts conclusion that a tax on income from property is a direct tax; it speaks not at all to other levies that might be direct taxes. Subsequent case law did not eliminate the concept of 'direct taxes' . . .")

citizen of the United States . . . whether . . . derived from any kind of property, rents, interests, dividends, or salaries, or from any profession, trade, employment, or vocation." 157 U.S. at 434 n.1 (quoting Act of Aug. 27, 1894, ch. 349, § 27, 28 Stat. 509, 553). The plaintiff in *Pollock* contended that the statute constituted an unapportioned direct tax because the imposition of a tax on the income of property, whether real estate or personal property, effectively imposed a tax upon the property itself. *Id.* at 555. The Supreme Court held that the tax on income from real estate was a direct tax and was therefore invalid unless apportioned. *Id.* at 583. Having reviewed its precedent on the question of direct versus indirect taxes "from that of *Hylton* to that of *Springer*," the Court found that its prior decisions "held real estate liable to direct taxation only." *Id.* at 579. The Court concluded that "[a]n annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income." *Id.* at 581. The Justices, however, remained "equally divided" as to whether a tax on income from personal property was a direct tax requiring apportionment. *Id.* at 586.

On rehearing, in *Pollock II*, the Court held that the tax on income from personal property was also an invalid direct tax. *Pollock II*, 158 U.S. at 637. The outcome of *Pollock II* was based in large part on the reasoning that a tax on income from personal property was invalid because a tax on the personal property would itself be invalid. The Court explained that the Constitution "forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power." *Id.* at 628. Consequently, the Court held, "the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom." *Id.* at 630. A general tax on personal property was therefore a direct tax, and as, such unconstitutional because unapportioned.

The Court, however, was clear that not all unapportioned taxes on personal property constituted invalid direct taxes. Throughout the *Pollock II* opinion the Court was careful to describe the income tax at issue as a general tax on the whole of an individual's personal property. *Id.* at 622 (holding that a "tax on the whole income of a property" is a direct tax); *id.* at 625 (describing the tax at issue as a tax on "the whole income" from an individual's "whole property"); *id.* at 627 (explaining that a "general unapportioned tax" on the income of property is a direct tax just as would be a tax on the property itself); *id.* at 633 (framing the issue in the case as "whether a general unapportioned tax on the income of real and personal property can be sustained"); *id.* at 637 (describing the tax at issue as "a direct tax on all real estate and personal property, or the income thereof"). The Court made clear that its holding only extended to such general taxes. First, it did not overrule its earlier opinion in *Hylton*, which upheld an unapportioned tax on carriages. Id. at 626-27. Although the Court criticized *Hylton* as "badly reported," it quoted the opinion as good law, finding that the seriatim opinions in *Hylton* decided only "that a tax on carriages was an excise, and, therefore, an indirect tax" and that this holding did not foreclose the possibility that an income tax levied on all personal property was a direct tax that demanded apportionment. *Id.* The Court found "nothing in the *Hylton* case in conflict" with its understanding of a direct tax as a tax levied "upon one's whole income." *Id.* at 625-26.

Elsewhere in the opinion, the Court again made clear that its reasoning reached only *general* taxes on personal property. The Court approvingly quoted Alexander Hamilton's definition of direct taxes, which he championed in his successful litigation of *Hylton*:

> The following are presumed to be the only direct taxes. Capitation or poll taxes. Taxes on lands and buildings. *General assessments*, whether on the *whole property* of individuals, or on their *whole real or personal estate*; all else must of necessity be considered as indirect taxes.

Id. at 625 (emphases added) (quoting Hamilton's "argument in the *Hylton case* . . . [which] was not reported . . . but was published in 1851 by his son in the edition of Hamilton's writings except the Federalist"). The Court went on to endorse that definition, using Hamilton's standard to analyze the income tax at issue. The Court stated: "[Hamilton] gives . . . a definition which covers the question before us. A tax upon one's *whole income* is a tax upon the annual receipts from his *whole property*, and as such falls within the same class as a tax upon that property, and is a direct tax, in the meaning of the Constitution." *Id.* (emphases added); *see also Knowlton v. Moore*, 178 U.S. 41, 82 (1900) (summarizing the holding of *Pollock* as prohibiting "taxes on persons solely because of their general ownership of property [real or personal] from being levied by any other rule than that of apportionment").

In addition to *Hylton*, *Pollock* discussed other cases that rejected direct tax challenges to taxes on particular items of personal property, such as *Scholey v. Rew*, 90 U.S. (23 Wall.) 331 (1874) (involving a succession tax on realty), without overruling these cases. *See Pollock I*, 157 U.S. at 577-79.[10]

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[10] Indeed, *Pollock* did not even explicitly overrule the Supreme Court's earlier decision in *Springer*, 102 U.S. 586, which sustained the Civil War Income Tax, on the theory that "a tax on professional receipts might be treated as an excise or duty, and therefore indirect." *Pollock I*, 157 U.S. at 579.

Since its decision in *Pollock* the Court has repeatedly sustained unapportioned taxes on particular items of personal property that fell short of general taxes on the whole of one's property. See, *e.g.*, *Fernandez*, 326 U.S. at 362 (upholding an estate tax collected upon community property); *Bromley*, 280 U.S. at 138 (upholding a gift tax); *N.Y. Trust Co. v. Eisner*, 256 U.S. 345 (1921) (upholding an estate tax); *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916) (upholding a tax on the annual production of mines); *Billings v. United States*, 232 U.S. 261 (1914) (upholding a tax on foreign built yachts); *Thomas*, 192 U.S. at 370 (upholding a stamp tax on memorandum or contracts of sale of a certificate of stock); *Sprekles Sugar Ref. Co. v. McClain*, 192 U.S. 397 (1904) (upholding a tax on the refining of sugar); *Patton v. Brady*, 184 U.S. 608 (1902) (upholding a tax on the manufacturing of tobacco); *Knowlton*, 178 U.S. at 83 (upholding a tax on legacies and distributive shares of personal property).[11]

Pollock, therefore, does not teach that the EPACT special assessments are direct taxes requiring apportionment. We agree with *Pollock*'s conclusion that the only impermissible direct tax on personal property is a general tax on broad classes of personal property.[12] Unlike the income tax at issue in

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[11]*See also* Jensen, 97 Colum. L. Rev. at 2375 ("*Pollock* was precedent shattering but, despite its logic, it had little influence outside the income-tax area. After (and despite) *Pollock*, the Supreme Court continued to view the direct-tax rules narrowly. Several cases made it clear that Pollock was to be given no expansive interpretation; the *Pollock* analysis was not to be extended to overturn other once-settled rules." (footnote omitted)).

[12]In *Eisner v. Macomber*, 252 U.S. 189 (1920), the Supreme Court invalidated a tax upon corporate stockholders' "share of the undivided profits previously accumulated by the corporation" imposed on stock dividends. *Id.* at 217. The Court held that this tax on stock dividends was unconstitutional because it was an unapportioned direct tax. Id. at 219. The Sixteenth Amendment did not exempt the tax from the constitutional apportionment requirement because the tax could not be considered a tax

Pollock, the tax at issue here is not a general tax on the whole of one's personal property or even a tax on a broad class of personal property. Rather, it is a carefully tailored tax, like the one sustained in *Hylton* and other cases, levied upon only one particular kind of personal property, government-enriched uranium. It is therefore not a direct tax.

IV

A

There is an alternative reason why the EPACT special assessments are not direct taxes. Excises are not direct taxes, and the tax at issue here is clearly an excise. The Constitution conceives of excise taxes in contradistinction to direct taxes, requiring "direct Taxes" to be "apportioned among the several States," U.S. Const., art. I, § 2, cl. 3, while requiring "Excises [to] be uniform throughout the United States," id. art. I § 8, cl. 1. Both *The Federalist* and the Supreme Court have recognized that excise taxes are not direct taxes. In *The Federalist*, Hamilton stated that "internal taxes may be subdivided into those of the direct and those of the indirect kind . . . [and] the latter . . . must be understood [as] duties and

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on income. *See id.* at 192. The appellant here places little reliance on *Eisner v. Macomber*, and properly so. The continued viability of that decision is open to question. *See Helvering v. Griffiths*, 318 U.S. 371, 404, 409 (1943) (Douglas, J. dissenting) (describing *Eisner v. Macomber* as "d[ying] a slow death" and expressing the opinion that *Eisner v. Macomber* should have been overruled); *Helvering v. Gowran*, 302 U.S. 238 (1937); *Koshland v. Helvering*, 298 U.S. 441, 446 (1936). Furthermore, in light of other Supreme Court decisions, cited in the text, upholding taxes on particular property, *Eisner v. Macomber* must be viewed as invalidating only unapportioned taxes on the particular broad class of property (corporate stock) involved in that case.

excises on articles of consumption." *The Federalist* No. 36, at 219 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also id.* No. 21 at 142-43. Likewise, the Supreme Court has referred to excise taxes "as the antithesis" of direct taxes. *Knowlton*, 178 U.S. at 81 (framing the issue in the case as the Court being "asked to decide that a tax is a direct tax on property which has at all times been considered as the antithesis of such tax; that is, has ever been treated as a duty or excise"); *see also Bromley*, 280 U.S. at 136, 138 (holding that the Court need not determine the precise boundaries of direct taxes because the tax at issue was clearly an excise and therefore not a direct tax, and explaining that excises "have been deemed to be indirect and so valid although not apportioned"); *Scholey*, 90 U.S. (23 Wall.) at 348 ("Neither duties nor excises were regarded as direct taxes by the authors of the *Federalist*."). The tax here, for two separate reasons, is an excise and therefore not a direct tax.

First, the EPACT tax is an excise because it taxes consumables. As *The Federalist* notes, indirect taxes include "excises on articles of consumption." *The Federalist* No. 36, at 219; *see also id.* No. 21, at 142 (including "[i]mposts, excises, and in general, all duties upon articles of consumption" in the category of taxes not requiring apportionment). In determining that the carriage tax was an excise, *see Pollock II*, 158 U.S. at 627, two of the three seriatim opinions in *Hylton* also emphasized the "consumable commodity" nature of carriages as a determining factor. *Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J.); *id.* at 180-81 (Patterson, J.). The appellant contends, however, that the consumability of a taxed good is not an indicium of indirect taxes. Rather, a tax must be on the actual consumption of the goods to fall within the category of indirect taxes. This understanding does not find support in *Hylton*, where the tax was on ownership and not on actual use. None of the Court's

seriatim opinions considered whether a carriage as a "consumable commodity" was actually consumed or used.

The Court embraced this consumability reasoning again in *Patton*, a case that arose well after *Pollock*. The contested statute in *Patton* imposed a tax on "tobacco and snuff, however prepared, manufactured and sold, for consumption or sale." *Patton*, 184 U.S. at 617 (quoting Act of June 13, 1898, ch. 448, § 3, 30 stat. 448, 449). The Court upheld the statute as an excise tax not requiring apportionment. *See id.* at 623. In doing so, the Court considered the meaning of the term "excise." *Id.* at 617-18. The Court held that the tobacco tax was "[o]bviously . . . intended by Congress as an excise," *id.* at 615, because it was imposed "on an article manufactured for consumption, and imposed at a period intermediate the commencement of manufacture and the final consumption of the article," *id.* at 618. The Court further qualified the scope of the excise tax by explaining that "it is not a tax upon property as such but upon certain kinds of property, having reference to their origin and their *intended use*." *Id.* at 619 (emphasis added). Thus the Court again found the tax to be indirect, an excise in particular, because it was imposed on goods of a consumable nature. And again, the Court upheld the tax without regard to the actual consumption of such goods. Enriched uranium is also a "consumable commodity," irrespective whether it is actually used, and a tax on enriched uranium is therefore an excise.

Second, the EPACT tax is an excise because its incidence falls on a particular activity related to property—here the purchase of enrichment services or enriched uranium—as opposed to the mere ownership of property. The Court has "consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be

apportioned." *Bromley*, 280 U.S. at 136. In particular, the Court has stated that a tax upon the "retail sale" of a "commodity" is an excise. *Patton*, 184 U.S. at 618. So too, in *Thomas*, the Court held "a stamp tax on a memorandum or contract of sale of a certificate of stock" to be an excise, explaining that "[t]he sale of stocks is a particular business transaction" and that "[t]he stamp duty is contingent on the happening of the event of sale." 192 U.S. at 370-71. As such, excise taxes are distinguishable from those taxes that "fall[] upon the owner merely because he is [an] owner." *Bromley*, 280 U.S. at 137; *see also Stanton*, 240 U.S. at 114 (emphasizing that an excise tax falls upon privileges of property as opposed to a tax "because of ownership"); *Fernandez*, 326 U.S. at 354 ("[W]ithout apportionment [Congress] may lay an excise upon a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property."); *see also Billings*, 232 U.S. at 280. We see no difference in substance between the sale of property and the purchase of property. Indeed, the Supreme Court has repeatedly sustained excise taxes on the receipt of property via inheritance. *See Fernandez*, 326 U.S. at 353 ("If the gift of property may be taxed, we cannot say that there is any want of constitutional power to tax the receipt of it, whether as the result of inheritance or otherwise . . . ." (citation omitted)).

The EPACT special assessments fall within this definition of excise taxes as well. The EPACT tax was not imposed on the mere ownership of enriched uranium. Rather, the tax was limited to purchases of government enrichment services or government-enriched uranium "for the purpose of [domestic] commercial electricity generation" prior to October 24, 1992. 42 U.S.C. § 2297g-1(c). These qualifications make clear that the special assessments were not, as the appellant urges, imposed on the mere "ownership of the uranium itself." (Br. for Appellant at 11.)

B

We conclude that an excise tax (in contradistinction to a direct tax) is a tax imposed on the acquisition, ownership, or use of particular kinds of categories of property that falls short of being a general tax on the whole of an individual's personal property. Also, the tax here on the ownership of government-enriched uranium purchased directly or indirectly from the government is indistinguishable from taxes on carriages, tobacco, yachts and other types of personal property that have long been accepted as excise taxes. The EPACT tax is not therefore a direct tax, and does not require apportionment.

C

The appellant alternatively argues that the EPACT tax is not an excise because it is unavoidable, the tax here having been imposed retroactively after the purchase of government enrichment services or government-enriched uranium. The appellant points out that *The Federalist* in general described direct taxes as being unavoidable taxes and excise taxes as being avoidable taxes. In *The Federalist* No. 21, Hamilton discussed the economic theory behind unapportioned "[i]mposts, excises, and, in general, all duties upon articles of consumption," *id.* at 142, explaining that "[i]f duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds . . . itself a natural limitation on the power of imposing them." *Id.* at 142-43. Such taxes, Hamilton explained, "usually fall under the denomination of indirect taxes." *Id.* at 143.

But *The Federalist* hardly describes avoidability as a necessary characteristic of indirect taxes. In *Pollock I* the Court did state that "[o]rdinarily all taxes paid primarily by persons who can shift the burden upon some one else . . . are considered indirect taxes" and that general property taxes that

"cannot be avoided, are direct taxes." *Pollock I*, 157 U.S. at 558; *see also Thomas*, 192 U.S. at 371. This passage, however, does not limit the category of excises to avoidable taxes, rather it indicates that avoidability is generally a feature of excise taxes. In *Knowlton*, a case that upheld a tax on "legacies and distributive shares," 178 U.S. at 44, the Court explicitly rejected the appellant's argument here that "it was decided in the income tax cases [including *Pollock*] that . . . [if] duties cannot be shifted from the one on whom they are first cast by law . . . they are direct taxes requiring apportionment." *Id.* at 81-82. The Court held that the succession tax at issue did not have to be avoidable to be indirect. The Court considered the opposite contention a "fallacy," because although "the income tax cases [present] the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same . . . this disputable theory was not the basis of the conclusion of the [C]ourt" in those cases. *Id.* at 81-82. The Court rejected the argument that "excises which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because . . . they could not be shifted from the person upon whom they first fall." *Id.* In a subsequent estate tax case, the Court relied on its opinion in *Knowlton* to reject the argument that "where the tax is on the privilege of receiving, the tax is indirect because it may be avoided, whereas here the tax is inevitable and therefore direct." *N.Y. Trust Co.*, 256 U.S. at 349. Following *Knowlton* and *New York Trust Co.*, we reject the appellant's argument that the EPACT tax is necessarily not an excise because it is unavoidable.[13]

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[13] Union Electric requests in a footnote that "if this Court chooses to remand . . . [it] make clear that the Court of Federal Claims erred in dismissing Union Electric's contract claim." (Br. for the Appellant at 52

CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Federal Claims.

AFFIRMED

COSTS

No costs.

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n.11.) The appellant's contract claim is foreclosed by our earlier decisions in *Yankee Atomic* and *Commonwealth Edison*.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

[Filed January 30, 2003]

No. 96-674C

UNION ELECTRIC COMPANY,
Plaintiff,

v.

UNITED STATES,
Defendant.

OPINION

FUTEY, *Judge*.

This case comes before the court on defendant's motion to dismiss plaintiff Union Electric's First Amended Complaint. The complaint was filed after a stay which was lifted on the resolution of substantially identical claims in *Yankee Atomic Electric Co. v. United States*, 112 F.3d. 1569 (Fed. Cir. 1997), *cert. denied*, 524 U.S. 951 (1998) and *Maine Yankee Atomic Electric Co. v. United States*, 271 F.3d 1357, *cert. denied*, 70 U.S.L.W. 3464 (May 28, 2002).

Those cases, along with *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001) (en banc), *cert.*

denied, 70 U.S.L.W. 3616 (May 28, 2002), laid to rest the claims among more than 20 related "decontamination and decommissioning fund" (D & D) cases filed in the United States Court of Federal Claims (Court of Federal Claims)[1] The suits were varied in their assertion of contract, illegal exaction, and constitutional claims, but all found a common target in the Energy Policy Act of 1992[2] (EPACT) and the series of transactions related to its application.

Most of the cases that were not otherwise resolved prior to the rulings of the United States Court of Appeals for the Federal Circuit (Federal Circuit) have been voluntarily dismissed. Binding precedent has made it clear that an adverse ruling in the Court of Federal Claims awaits. Plaintiff acknowledges that six of the seven courts it filed (Counts One through Five, and Seven) should be dismissed.

Plaintiff offers in its amended complaint, however, a new claim, Count Six, which it asserts is not addressed by the D & D precedent. Count Six argues that EPACT imposed assessments that "constitute a . . . 'direct tax' . . . and thus violate[] the Constitution."[3] Plaintiff contends that the payments it has made in accordance with EPACT are an illegal exaction for which plaintiff is entitled to a refund.

Factual Background

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[1] Plaintiff's (Pl.'s) Reply to Defendant's (Def.'s) Memo in Opposition (Opp'n) to Stay at 2, n.l.

[2] In particular the suits challenged certain provisions of the Act, which levied assessments against plaintiffs. See 42 U.S.C. § 2297g-1(b)-(c).

[3] Pl.'s First Amended Complaint (Comp.) at 37-38.

Plaintiff operates electricity-generating facilities, including the Callaway Nuclear Power Plant (Callaway), located in Missouri. Plaintiff entered into several contracts with defendant at various times between 1980 and 1992 to supply uranium enrichment services for use at Callaway. Both parties performed their obligations under the contracts.

In 1992, EPACT was passed by Congress as a means of funding the decontamination and decommissioning of uranium enrichment facilities. The history of EPACT and its application to plaintiff and others similarly situated has been described elsewhere by the Federal Circuit and need not be repeated.[4]

EPACT provides that the costs of decontaminating uranium enrichment facilities is to be borne both by defendant and utility companies that had benefited from the use of enriched uranium through the years, including plaintiff. Up to $150 million, adjusted for inflation, is charged each year as an assessment against domestic utility companies. The balance, approximately another $330 million, is to be paid by the government for 15 years or until $2.25 billion, also adjusted for inflation, is collected.[5] The assessments are made on a pro-rata basis according to the amount of enrichment services used by the utility. Plaintiff alleges that it has paid $14,426,240.51 pursuant to EPACT as of the date of its complaint.

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[4] See, e.g., *Commonwealth Edison Company v. United States*, 271 F.3d 1327, 1327-37 (Fed. Cir. 2001) (en banc), *cert. denied*, 70 U.S.L.W. 3616 (May 28, 2002); *Maine Yankee Atomic Power v. United States*, 271 F.3d 1357, 1360-63 (Fed. Cir. 2001), *cert. denied*, 70 U.S.L.W. 3464 (May 28, 2002).

[5] Energy Policy Act of 1992 § 1802(c), 42 U.S.C. §§ 2297g-1(c).

Discussion

Defendant argues that plaintiff has failed to state a claim upon which relief may be granted, pursuant to RCFC 12(b)(6). The court will grant such a motion only if it appears beyond a doubt that plaintiff has failed to allege facts sufficient to support the claim. *Conley v. Gibson*, 355 U.S. 41, 45 (1957); *Mostowy v. United States*, 966 F.2d 668 (Fed. Cir. 1992). In ruling on a 12(b)(6) motion to dismiss, the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to plaintiff. *Papasan v. Allain*, 478 U.S. 265, 283 (1986) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed Cir. 1991). Nevertheless, "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981), *aff'd*, 460 U.S. 325 (1983). "[L]egal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." *Blaze Constr., Inc., v. United States*, 27 Fed. Cl. 646, 650 (1993) (internal quotations omitted).

I. Counts One through Five, and Seven

Plaintiff "does not dispute that Counts One through Five of the First Amended Complaint allege contractual and constitutional claims substantially similar to those that the Federal Circuit has rejected in published decisions issued in cognate litigations."[6] Plaintiff likewise recognizes that Count Seven "is currently barred by Supreme Court precedents . . . ."[7]

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[6] Pl.'s Memo in Opp'n to Def.'s Motion (Mot.) to Dismiss at 2.

[7] Id.

In light of these acknowledgments with which the court fully concurs, it is unnecessary to engage in a lengthy analysis of plaintiff's claims. In short, Count One asserts that EPACT assessments are an uncompensated taking. This has been denied by the Federal Circuit in *Commonwealth Edison*, 271 F.3d at 1329. Count Two alleges that the assessments deny plaintiff property without due process, a claim also rejected in *Commonwealth Edison*, 271 F.3d at 1329-30. Count Three argues that the assessments deny plaintiff equal protection of the law. The Federal Circuit rejected this claim in *Maine Yankee*, 271 F.3d at 1359. Counts Four and Five assert various contract claims rejected in *Yankee Atomic*, 112 F.3d at 1579-80 and *Commonwealth Edison*, 271 F.3d at 1330-33.

Plaintiff contends by Count Seven that the retroactive nature of the EPACT assessments violates the *Ex Post Facto* Clause of the Constitution. For more than 200 years the *Ex Post Facto* Clause has been held to apply only to retroactive criminal punishments. See *Calder v. Bull*, 3 U.S. 386 (3 Dall. 1798). Although one Justice of the United States Supreme Court (Supreme Court) has recently stated an interest to "reconsider *Calder* and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the *Ex Post Facto* Clause,"[8] this court may not.

All six of the above-mentioned counts must be dismissed. Questions of law decided by the Federal Circuit constitute binding precedent upon the court.[9]

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[8] *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539 (1998) (Thomas, J., concurring).

[9] *Compliance Corp. v. United States*, 22 Cl. Ct. 193, 204-05, n.9 (1990), *aff'd*, 960 F.2d 157 (Fed. Cir. 1992).

II. Count Six: Whether EPACT Assessments are a Direct Tax.

The essence of Count Six is that the assessments levied against plaintiff pursuant to EPACT constitute a "direct tax" upon property not apportioned according to the census. Such a tax, alleges plaintiff, is unconstitutional.[10] Plaintiff also notes that the Federal Circuit has ruled that EPACT assessments are a tax. *Yankee Atomic*, 112 F.3d at 1577.

Defendant counters on procedural and substantive grounds. It argues that plaintiff is precluded from raising the argument that EPACT assessments are unconstitutional direct taxes, stating that the issue has been raised and settled by *Maine Yankee* and other cases litigating EPACT.[11] Defendant then addresses the meaning of the "direct tax" clauses of the Constitution, arguing that the EPACT assessments do not fit within the constitutional meaning of that term.

Plaintiff alleges that it has paid money over to the Government pursuant to a tax assessment in contravention of the Constitution. The Court of Federal Claim's "jurisdiction is limited to such cases where the Constitution or a federal statute requires the payment of money damages as compensation." *Murray v. United States*, 817 F.2d 1580, 1582-83 (Fed. Cir. 1987), *aff'd*, 864 F.2d 148 (Fed. Cir. 1988), *cert. denied*, 489

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[10] Pl.'s Memo in Opp'n to Def.'s Mot. to Dismiss at 3.

[11] Def.'s Brief in Reply to Pl.'s Opp'n to Mot. to Dismiss at 1.

U.S. 1055 (1989). Jurisdiction extends also, however, to "illegal exactions," which are cases where a "plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum . . . improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599; See also, *Aerolineas Argentinas v. United States*, 77 F.3d 1564 (Fed. Cir. 1996).

Plaintiff has advanced a wide-ranging argument to persuade the court that the EPACT assessments constitute an unconstitutional direct tax. Defendant has countered each point of that argument. Although both parties are credited for providing a thorough exposition of this rarely litigated claim, the court does not need to reach the merits of this issue. The conviction of the court is that a careful reader of *Yankee Atomic, Maine Yankee* and *Commonwealth Edison* must conclude that the Federal Circuit has rejected this claim, and Count Six must be dismissed.

The principle of *stare decisis* applies to the present case. The basic statement of the rule is that an issue of law is settled, and therefore binding, where it has been both heard and decided by an earlier court.[12] *Stare decisis* applies, of course, "only to legal issues that were actually decided in a prior action," but not to issues neither "litigated [n]or resolved." *Beacon Oil Co. v. O'Leary*, 71 F.3d 391, 395 (Fed. Cir. 1995).

Defendant states that "[t]he Federal Circuit opinion [in *Maine Yankee*] expressly addressed . . . takings, due process, and equal protection challenges to the EPACT assessment." It acknowledges that the Federal Circuit "did not mention the

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[12] See, e.g., 18 James Wm. Moore et al., Moore's Federal Practice § 134.04 [2] (3d ed. 1998).

unapportioned direct tax challenge" but argues that "[t]he suggestion that the Federal Circuit 'ignored' this theory is untenable: it implies that the Federal Circuit was blind to a constitutional challenge that required reversal."[13]

In fact, the Federal Circuit held in *Yankee Atomic* that [g]iven the focus of the relevant provisions of the Energy Policy Act, we conclude that [the EPACT special assessment] constitutes a general exercise of Congress's taxing power . . . ." *Yankee Atomic*, 112 F.3d at 1577. The court grounded its approval of EPACT assessments on the theory that those assessments are taxes. It is indeed untenable to assert that the court would issue that holding without simultaneously considering whether such taxes are constitutional.

Plaintiff's principal objection to applying *stare decisis* in this case is that the Federal Circuit's rulings have not made "any mention of . . . 'direct tax' arguments" in its EPACT-related rulings and "[c]ourts do not adjudicate important issues of constitutional law by strict silence."[14] As a general rule that is true. The Supreme Court, however, has made a more limited statement holding that a "case is not a binding precedent" on a point not "raised in briefs or argument nor discussed in the opinion of the Court." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

The unapportioned direct tax argument was made before the Court of Federal Claims and the Federal Circuit in

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[13] Def.'s Brief in Reply to Pl.'s Opp'n to Mot. to Dismiss at 2.

[14] Pl.'s Memo in Opp'n to Def.'s Mot. to Dismiss at 18.

litigation relating to *Maine Yankee*.[15] The court had opportunity to hear this claim, but affirmed dismissal of the case on other grounds. No such dismissal would have been proper, however, if the direct tax challenge had merit.

Finally, the Federal Circuit addressed a range of constitutional claims in *Commonwealth Edison*. The court held that Commonwealth's "amended complaint failed to state a Due Process claim for which relief may be granted. We also conclude that EPACT is *otherwise* constitutional." *Commonwealth Edison v. United States*, 271 F.3d at 1357 (emphasis added). To state that it is "otherwise" constitutional is to indicate that not merely Due Process but the broader range of constitutional claims were considered.

The application of *stare decisis* to the present case is proper in light of the history of this litigation. It is true that no Federal Circuit decision has unambiguously announced a ruling denying the unapportioned direct tax claim argued by plaintiffs. The D & D litigation, however, has encompassed dozens of lawsuits, offering a spectrum of constitutional arguments against EPACT. Those arguments, including the direct tax challenge at issue here, were heard in turn by the Federal Circuit which did not regard the issue as dispositive. It cannot be assumed that the Federal Circuit has chosen to base the resolution of this complicated litigation on an unconstitutional act. Further, a petition for certiorari was filed in each of these decisions and denied. This court holds that a better reading of *Commonwealth Edison, Yankee Atomic,* and *Maine Yankee* forecloses any suit predicated on an unapportioned direct tax challenge. As with the *Ex Post Facto*

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[15]The *Maine Yankee* opinion resolved three appeals, including that of *Sacramento Municipal Utility District*, 44 Fed. Cl. 395 (1999), which raised the unapportioned direct tax argument. See Def.'s Mot. to Dismiss at 6, n.3.

Clause, it may be that a Direct Tax Clause challenge should be heard in an appropriate case, but that is beyond the limits of this court today.

Conclusion

For the above-stated reasons, all counts of plaintiff's First Amended Complaint, one through seven, are DISMISSED. No Costs.

IT IS SO ORDERED.

APPENDIX C

PERTINENT PROVISIONS OF EPACT AS ENACTED (PUBLIC LAW 102-486—OCT. 24, 1992)

PERTINENT PROVISIONS OF TITLE XI (106 STAT. 2951 ET SEQ.)

TITLE XI—URANIUM ENRICHMENT HEALTH, SAFETY, AND ENVIRONMENT ISSUES.

The Atomic Energy Act of 1954 (42 U.S.C. 2011, *et seq.*), as amended by title IX of this Act, is further amended by adding at the end of title II the following:

* * * *

"CHAPTER 28—DECONTAMINATION AND DECOMMISSIONING

"SEC. 1801. URANIUM ENRICHMENT DECONTAMINATION AND DECOMMISSIONING FUND. [42 USC 2297g.]

"(a) ESTABLISHMENT.—There is established in the Treasury of the United States an account to be known as the Uranium Enrichment Decontamination and Decommissioning Fund (referred to in this subchapter as the "Fund"). The Fund, and any amounts deposited in it, including any interest earned thereon, shall be available to the Secretary subject to appropriations for the exclusive purpose of carrying out this subchapter.

"(b) ADMINISTRATION.—

(1) IN GENERAL.—The Secretary of the Treasury shall hold the Fund and, after consultation with the Secretary,

annually report to the Congress on the financial condition and operations of the Fund during the preceding fiscal year.

(2) INVESTMENTS.—The Secretary of the Treasury shall invest amounts contained within the Fund in obligations of the United States--

(A) having maturities determined by the Secretary of the Treasury to be appropriate for what the Department determines to be the needs of the Fund; and

(B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to these obligations.

"SEC. 1802. DEPOSITS. [42 USC 2297g-1.]

"(a) AMOUNT.—The Fund shall consist of deposits in the amount of $518,233,333 per fiscal year (to be annually adjusted for inflation beginning on October 24, 1992 using the Consumer Price Index for all-urban consumers published by the Department of Labor) as provided in this section.

"(b) SOURCE.—Deposits described in subsection (a) of shall be from the following sources:

(1) Sums collected pursuant to subsection (c) of this section.

(2) Appropriations made pursuant to subsection (d) of this section.

"(c) SPECIAL ASSESSMENT.—The Secretary shall collect a special assessment from domestic utilities. The total

amount collected for a fiscal year shall not exceed $150,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor). The amount collected from each utility pursuant to this subsection for a fiscal year shall be in the same ratio to the amount required under subsection (a) of this section to be deposited for such fiscal year as the total amount of separative work units such utility has purchased from the Department of Energy for the purpose of commercial electricity generation, before October 24, 1992, bears to the total amount of separative work units purchased from the Department of Energy for all purposes (including units purchased or produced for defense purposes) before October 24, 1992. For purposes of this subsection--

(1) a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department, but purchased by the utility from another source; and

(2) a utility shall not be considered to have purchased a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source.

"(d) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Fund, for the period encompassing 15 years after October 24, 1992, such sums as are necessary to ensure that the amount required under subsection (a) of this section is deposited for each fiscal year.

"(e) TERMINATION OF ASSESSMENTS.—The collection of amounts under subsection (c) of this section shall cease after the earlier of--

(1) 15 years after October 24, 1992; or

(2) the collection of $2,250,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor) under such subsection.

"(f) CONTINUATION OF DEPOSITS.—Except as provided in subsection (e) of this section, deposits shall continue to be made into the Fund under subsection (d) of this section for the period specified in such subsection.

"(g) TREATMENT OF ASSESSMENT.—Any special assessment levied under this section on domestic utilities for the decontamination and decommissioning of the Department's gaseous diffusion enrichment facilities shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost.

(2)

Supreme Court, U.S.
FILED
AUG 27 2004
OFFICE OF THE CLERK

No. 03-1709

In the Supreme Court of the United States

UNION ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In order to acquire some of the funds necessary to decontaminate and decommission uranium enrichment facilities operated by the Department of Energy (DOE), Congress imposed a special assessment on those domestic utilities that had purchased uranium enrichment services either directly from DOE or in the secondary market. See 42 U.S.C. 2297g, 2297g-1. The question presented is as follows:

Whether the special assessment constitutes a "direct tax" that violates the Constitution, Article I, Section 2, Clause 3, and Article I, Section 9, Clause 4, because it is not apportioned among the States on the basis of population.

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In the Supreme Court of the United States

No. 03-1709

UNION ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 363 F.3d 1292. The opinion of the Court of Federal Claims (Pet. App. 26a-35a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2004. The petition for a writ of certiorari was filed on June 24, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Energy Policy Act of 1992 (EPACT), Pub. L. No. 102-486, 106 Stat. 2776, establishes a "comprehensive national energy policy" that addresses, *inter alia*, "solutions to our nuclear waste and uranium enrich-

ment problems." H.R. Rep. No. 474, 102d Cong., 2d Sess. Pt. 1, at 132 (1992). Among those problems was contamination at uranium enrichment facilities operated by the Department of Energy (DOE). See *id.* Pt. 8, at 77-78; Pet. App. 2a. Beginning in the 1960s, the government had offered commercial uranium enrichment services to utility companies for use in power generation. See *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327, 1331 (Fed. Cir. 2001), cert. denied, 535 U.S. 1096 (2002).[1]

DOE offered uranium enrichment services to utilities under an arrangement by which the purchasers furnished low-grade uranium, DOE processed the uranium, and DOE then returned the enriched uranium to the utilities. See *Florida Power & Light Co.* v. *United States*, 307 F.3d 1364, 1371-1372 (Fed. Cir. 2002) (describing enrichment process). The enrichment services were measured in terms of "separative work units" (SWUs), which "measure[] the amount of energy required for the enrichment of each utility's uranium" to the desired level. *Id.* at 1372. Utilities were charged a fee calculated by multiplying the number of SWUs they received by the unit price in the contract. See *Commonwealth Edison*, 271 F.3d at 1331. The unit pricing varied somewhat from contract to contract but was generally established by reference to the price in effect at the time the service was rendered, and in some

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[1] As the court of appeals in this case noted (Pet. App. 2a), Federal Circuit opinions in other recent cases have discussed in detail the history and purposes of EPACT. See *Yankee Atomic Elec. Co.* v. *United States*, 112 F.3d 1569, 1572 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998); *Commonwealth Edison*, 271 F.3d at 1330-1336; see also *Maine Yankee Atomic Power Co.* v. *United States*, 271 F.3d 1357, 1360-1361 (Fed. Cir. 2001) (Friedman, J., concurring), cert. denied, 535 U.S. 1095 (2002).

cases was contractually capped at a maximum price. *Ibid.*

In enacting EPACT, Congress determined that domestic utilities that had benefitted from DOE's uranium enrichment services should contribute a portion of the cost of decontaminating the facilities where that enrichment was conducted. See H.R. Rep. No. 474, *supra*, Pt. 8, at 77-78; 138 Cong. Rec. 32,073 (1992) (remarks of Rep. Sharp). EPACT established the Uranium Enrichment Decontamination and Decommissioning Fund (Fund) to accumulate and disburse the money needed to decontaminate those facilities. See 42 U.S.C. 2297g, 2297g-1. Under the Act, the federal government will absorb approximately 68% of the decontamination costs through annual appropriations to the Fund. See 42 U.S.C. 2297g-1(a), (b)(2), (c), and (d); *Commonwealth Edison*, 271 F.3d at 1333.

The remaining 32% (not to exceed $2.25 billion over 15 years) of the Fund's financial base is collected in annual installments (not to exceed $150 million per year, adjusted annually for inflation) from domestic utilities that had previously obtained enrichment services from the federal government. See 42 U.S.C. 2297g-1(c). The sum that a particular utility is required to contribute to the Fund is calculated by reference to "the total amount of separative work units such utility has purchased from the Department of Energy for the purpose of commercial electricity generation, before October 24, 1992." 42 U.S.C. 2297g-1(c); see Pet. App. 3a & n.3. In making that calculation, "a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department, but purchased by the utility from another source," 42 U.S.C. 2297g-1(c)(1); and "a utility shall not be considered to have purchased

a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source," 42 U.S.C. 2297g-1(c)(2). The effect of the EPACT calculation mechanism is thus to "impose[] the assessment upon whichever utility company eventually uses the enrichment services." *Yankee Atomic Elec. Co.* v. *United States*, 112 F.3d 1569, 1572 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998). Utilities that are required to pay an assessment to the Fund may in turn treat that assessment as a "necessary and reasonable current cost of fuel" that is "fully recoverable in rates * * * in the same manner as the utility's other fuel cost." 42 U.S.C. 2297g-1(g).

2. A number of utilities, including petitioner, filed suit in the Court of Federal Claims (CFC), challenging the EPACT assessment on a variety of grounds. In *Yankee Atomic*, the court of appeals rejected the utility's contention that the assessment "violate[d] the Government's earlier contractual agreements to supply enriched uranium at fixed prices." 112 F.3d at 1571; see *id.* at 1573-1580. The court held, *inter alia*, that "the contracts between Yankee Atomic and the Government did not include an unmistakable promise that precluded the Government from later imposing an assessment upon all domestic utilities that employed the DOE's uranium enrichment services." *Id.* at 1580. The court explained that the assessment "is not a deliberate retroactive increase in the price of those contracts," but is instead "the Government's way of spreading the costs of the later discovered decontamination and decommissioning problem on all utilities that benefited from the Government's service, whether or not those services were acquired by contract from the Government." *Ibid.* This Court denied the utility's petition

for certiorari. *Yankee Atomic Electric Co.* v. *United States*, 524 U.S. 951 (1998) (No. 97-801).

In its subsequent decision in *Commonwealth Edison*, the en banc Federal Circuit held that the EPACT assessment did not effect a taking of the utility's property without just compensation, see 271 F.3d at 1338-1340, and that it did not violate the utility's right to substantive due process, see *id.* at 1341-1357. The court concluded, *inter alia*, that the retroactive nature of the assessment did not render it unconstitutional. The court explained that the utility "operate[d] in a highly regulated industry" and could therefore "expect liability for remediation costs." *Id.* at 1348. The court also observed that Commonwealth Edison was "aware of the hazardous nature of the materials" and had long recognized "that there would be decontamination and decommissioning costs arising from the operation of the uranium processing facilities." *Id.* at 1349. This Court again denied certiorari. *Commonwealth Edison Co.* v. *United States*, 535 U.S. 1096 (2002) (No. 01-1411).

3. Petitioner's challenge to the EPACT assessment had been stayed pending disposition of suits filed by other utilities. After those cases were decided by the court of appeals, petitioner conceded that six of the seven counts of its complaint should be dismissed as inconsistent with binding precedents of the Federal Circuit and of this Court. See Pet. App. 27a, 29a. Petitioner continued, however, to press its contention that the assessment was a "direct tax" within the meaning of Article I, Section 2, Clause 3, and Article I, Section 9, Clause 4 of the Constitution (the Direct Tax Clauses). Petitioner argued that the assessment, which is not apportioned among the States on the basis of population, is therefore unconstitutional. See Pet. App. 27a.

The CFC dismissed petitioner's claim under the Direct Tax Clauses. Pet. App. 26a-35a. The court found that challenge to the EPACT assessment to be foreclosed by Federal Circuit precedent. See *id.* at 32a-35a. The CFC construed the Federal Circuit's prior decisions in *Commonwealth Edison* and in *Maine Yankee Atomic Power Co.* v. *United States*, 271 F.3d 1357 (2001), cert. denied, 535 U.S. 1095 (2002), as implicitly rejecting similar Direct Tax Clause challenges raised by the plaintiffs in those cases. See Pet. App. 33a-34a.

4. The court of appeals affirmed. Pet. App. 1a-25a.

a. The court of appeals disagreed with the CFC's holding that consideration of petitioner's constitutional claim was foreclosed by circuit precedent. Pet. App. 6a-9a. The court observed that "the direct tax issue was not specifically argued in *Yankee Atomic* or *Commonwealth Edison*." *Id.* at 7a. The court held that, "[e]ven if *Maine Yankee* were viewed as implicitly rejecting the direct tax argument, * * * the disposition of an issue by an earlier decision does not bind later panels of this court unless the earlier opinion explicitly addressed and decided the issue." *Id.* at 8a-9a. The court accordingly considered the merits of petitioner's constitutional claim. See *id.* at 9a.

b. On the merits, the court of appeals identified two independent bases for its conclusion that the EPACT assessment is not a "direct tax" within the meaning of the pertinent constitutional provisions. First, the court construed this Court's decisions to establish that "the only impermissible direct tax on personal property is a general tax on broad classes of personal property." Pet. App. 18a. The court stated that, unlike the tax on income from personal property that was struck down in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) (*Pollock II*), the EPACT assessment "is not a

general tax on the whole of one's personal property or even a tax on a broad class of personal property. Rather, it is a carefully tailored tax, * * * levied upon only one particular kind of personal property, government-enriched uranium. It therefore is not a direct tax." Pet. App. 19a.

As an "alternative reason why the EPACT special assessments are not direct taxes," the court of appeals held that the "tax at issue here is clearly an excise." Pet. App. 19a. That is so, the court stated, both because the EPACT assessment "taxes consumables," *id.* at 20a, and because "its incidence falls on a particular activity related to property—here the purchase of enrichment services or enriched uranium—as opposed to the ownership of property," *id.* at 21a. The court observed, in the latter regard, that "[t]he EPACT tax was not imposed on the mere ownership of enriched uranium. Rather, the tax was limited to purchases of government enrichment services or government-enriched uranium 'for the purpose of [domestic] commercial electricity generation' prior to October 24, 1992." *Id.* at 22a (quoting 42 U.S.C. 2297g-1(c)). The court of appeals concluded that the assessment "is indistinguishable from taxes on carriages, tobacco, yachts and other types of personal property that have long been accepted as excise taxes." *Id.* at 23a.[2]

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[2] Citing cases in which this Court had rejected similar arguments, the court of appeals also rejected petitioner's contention that, because the EPACT tax operates retroactively and is therefore unavoidable, it cannot be an excise tax. Pet. App. 23a-24a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The core premise of petitioner's constitutional challenge is the assertion that the EPACT assessment is a tax on "property" that is "imposed by reason of ownership." Pet. 11. That premise is incorrect. To help fund decontamination and decommissioning of the government's uranium enrichment facilities, EPACT assessed utilities for their prior use of DOE's enrichment services. See *Yankee Atomic*, 112 F.3d at 1575-1577; *Commonwealth Edison*, 271 F.3d at 1329-1330. The assessment imposed on each domestic utility is calculated by reference to the total amount of SWUs that the utility had purchased (directly or indirectly) from DOE before October 24, 1992. 42 U.S.C. 2297g-1(c); see *Commonwealth Edison*, 271 F.3d at 1333. That method of calculating the EPACT assessment reflects Congress's judgment that "the allocation of costs of cleaning up these plants * * * should be based on benefits received from the [enrichment] program." H.R. Rep. No. 474, *supra*, Pt. 1, at 144; see *Commonwealth Edison*, 271 F.3d at 1342; *Yankee Atomic*, 112 F.3d at 1575.[3]

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[3] Under the pre-EPACT legal regime, DOE was required to price the enrichment services on a cost-recovery basis; the program was not intended to be a profit-making enterprise. See 42 U.S.C. 2201(v)(B)(iii) (1988). Indeed, the House Report accompanying EPACT stated that, "[i]n the past, reliable government enrichment services offered to the private sector were accompanied by billions of dollars in taxpayer losses." H.R. Rep. No. 474, *supra*, Pt. 1, at 143. It had long been recognized, moreover, that decontamination and decommissioning of the enrichment facilities would eventually entail additional costs, see *Commonwealth*

Presumably some of the utilities that purchased SWUs from DOE before October 24, 1992, continued to own the enriched uranium as of that date. The basis for the assessment, however, is the prior receipt of benefits resulting from a federal program, not the ownership of enriched uranium on the assessment date; and the correlation between the two criteria is far from absolute. Petitioner is therefore wrong in characterizing the EPACT assessment as a tax on the ownership of property.

a. The EPACT assessment applies to a utility that purchased SWUs from DOE before October 24, 1992, even if the utility had already used the enriched uranium to generate electric power before the assessment date. After a utility has used enriched uranium to produce electricity, it no longer owns the enriched uranium, but instead owns spent nuclear fuel. See, *e.g.*, *General Elec. Uranium Mgmt. Corp.* v. *United States Dep't of Energy*, 764 F.2d 896, 897 & n.2 (D.C. Cir. 1985). Under the plain terms of EPACT, however, a utility that purchased enrichment services from DOE could not avoid the assessment by demonstrating that it had used the enriched uranium to generate electricity, and therefore ceased to own the enriched uranium itself, before October 24, 1992. See 42 U.S.C. 2297g-1(c) (calculating the special assessment by reference to "the total amount of separative work units such utility has *purchased* from the Department of Energy for the purpose of commercial electricity generation, before

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Edison, 271 F.3d at 1349; p. 5, *supra*; yet "the prices charged in the Government's past uranium enrichment contracts had not accounted for the problem," *Yankee Atomic*, 112 F.3d at 1572. It is therefore clear that DOE's pre-EPACT enrichment services to utilities entailed the provision of a government *benefit*, not simply the execution of an ordinary commercial transaction.

October 24, 1992," without regard to the utility's *ownership* of enriched uranium on the assessment date) (emphasis added). The applicability of Section 2297g-1(c) to that scenario refutes petitioner's contention (Pet. 23-24) that the EPACT assessment "applies by its express terms only to the utilities that *owned* government-enriched uranium materials on the assessment date."

As petitioner explains (Pet. 6 n.5, 24 n.15), if a utility purchased enrichment services from DOE, and resold the enriched uranium to another utility before October 24, 1992, the EPACT assessment is generally placed upon the transferee rather than the transferor utility. See 42 U.S.C. 2297g-1(c)(1) and (2). Contrary to petitioner's contention (Pet. 24 n.15), however, that feature of the statute does not mean that the assessment is "based on the ownership of the property on a specific date." The transferee utility in that situation remains liable for the assessment even if it used the enriched uranium to generate electricity, and therefore ceased to own it, before October 24, 1992. Rather, imposition of the EPACT assessment on the transferee utility in that scenario reflects Congress's decision to impose the assessment on "the ultimate beneficiary of the DOE's services." *Yankee Atomic*, 112 F.3d at 1575. That the EPACT assessment may be triggered by indirect as well as direct receipt of DOE's enrichment services does not alter the fact that it is the receipt of those services, not the ownership of property, that is the subject of the tax.

b. Even if a utility owned enriched uranium on October 24, 1992, it is not subject to the EPACT assessment unless the relevant enrichment services were provided by DOE. Because the assessment is calculated by reference to the amount of SWUs that a

utility has purchased (either directly or indirectly) "from the Department of Energy" (42 U.S.C. 2297g-1(c)), the assessment does not apply to "domestic utilities that purchased enriched uranium from foreign sources." Pet. App. 4a; see H.R. Rep. No. 474, *supra*, Pt. 8, at 76 (noting that "the DOE enrichment program has suffered from rising competition from other countries").[4] The effect of the statutory method of calculation is that two domestic utilities that owned physically equivalent stocks of enriched uranium on October 24, 1992, may be treated differently for purposes of the EPACT assessment, based on their use of different suppliers of enrichment services. That fact further refutes petitioner's contention that the EPACT assessment is imposed on the basis of ownership of property.[5]

2. Even if the EPACT assessment were triggered by a utility's ownership of DOE-enriched uranium on

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[4] The inapplicability of the assessment to those utilities follows logically from the purpose of the assessment, which is to place part of the costs of decontaminating and decommissioning DOE's facilities on those who previously benefitted from DOE's services.

[5] As noted above (see p. 10, *supra*), petitioner contends that the EPACT assessment "applies by its express terms only to the utilities that *owned* government-enriched uranium materials on the assessment date." Pet. 23-24. Petitioner's characterization of the assessment's coverage is inaccurate. See pp. 9-10, *supra*. Even if that description of the statutory scheme were factually correct, however, petitioner's reference to "*government-enriched* uranium materials" would be revealing. *Qua* property, "government-enriched" uranium is no different from uranium enriched to an equivalent degree by one of DOE's foreign competitors. The fact that EPACT distinguishes between government-enriched and other enriched uranium demonstrates that the assessment is not imposed on the basis of ownership of particular property, but rather on the basis of a utility's receipt of services from a particular provider.

the assessment date, as petitioner contends, the court of appeals' decision upholding the tax would not warrant this Court's review.

a. In *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796), this Court considered and rejected a constitutional challenge to an unapportioned federal tax levied "upon all carriages for the conveyance of persons, which shall be kept by or for any person, for his or her own use, or to be let out to hire, or for the conveying of passengers." Act of June 5, 1794, ch. 45, § 1, 1 Stat. 373-374; see Pet. App. 11a. The tax was imposed on "every person having or keeping a carriage or carriages, which, by this act, is or are made subject to the payment of duty." § 3, 1 Stat. 374.

All three Justices who participated in *Hylton* agreed that the challenged duty was an indirect rather than a direct tax and was therefore constitutional, notwithstanding the failure of Congress to apportion the tax among the States on the basis of population. See Pet. App. 11a-12a (summarizing individual opinions in *Hylton*). Those opinions indicate that the Framers regarded taxes levied on specific categories of consumable personal property as indirect. See *ibid.* Each of the three Justices in *Hylton*, moreover, relied in part on the fact that any effort to apportion the carriage tax would have been unjust and impractical "because the number of carriages in a state did not necessarily correlate to the state's population." *Id.* at 12a. That observation would be equally applicable to a tax levied on ownership of enriched uranium.[6]

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[6] Petitioner contends (Pet. 26) that the purpose of the Direct Tax Clauses was to prevent Congress from imposing a tax "on only one particular kind of property * * * that happened to be more prevalent in some regions of the Nation than in others." The

Petitioner characterizes *Hylton* as involving a tax on the "use" rather than the "ownership" of property. See Pet. 14 n.10, 23. Although dicta in subsequent decisions have suggested that a distinction between use and ownership may be relevant to the constitutional analysis (see pp. 16-17, *infra*), none of the Justices in *Hylton* relied on (or alluded to) that distinction. Rather, each of the three Justices who participated in *Hylton* referred to the challenged duty as a "tax on carriages." See 3 U.S. (3 Dall.) at 173, 174, 175 (opinion of Chase, J.); *id.* at 179, 180 (opinion of Paterson, J.); *id.* at 182, 183 (opinion of Iredell, J.); see also *Pollock II*, 158 U.S. at 627 ("What was decided in the *Hylton case* was, then, that a tax on carriages was an excise, and, therefore, an indirect tax.").

Other early decisions of this Court likewise construed the constitutional term "direct tax" to apply only to a narrow category of federal levies. In *Springer* v. *United States*, 102 U.S. 586 (1881), for example, the

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Justices in *Hylton*, however, specifically considered the possibility that the number of carriages per person might be greater in some States than in others. See 3 U.S. (3 Dall.) at 174 (opinion of Chase, J.); *id.* at 179 (opinion of Paterson, J.); *id.* at 181-182 (opinion of Iredell, J.). The Justices did not infer from that prospect that the carriage tax was unconstitutional or even constitutionally suspect. Rather, they treated the likelihood that carriages were not uniformly distributed among the States as an additional basis for characterizing the challenged tax as indirect. See *id.* at 174 (opinion of Chase, J.) (stating that "[t]he rule of *apportionment* is only to be adopted in *such* cases where it can reasonably apply," and concluding that "a tax *on carriages* cannot be laid by the rule of *apportionment*, without very great inequality and injustice"); *id.* at 179 (opinion of Paterson, J.) ("A tax on carriages, if apportioned, would be oppressive and pernicious."); *id.* at 182 (opinion of Iredell, J.) (apportionment of carriage tax "is too manifestly absurd to be supported").

Court sustained the federal Civil War Income Tax against the contention that it was an impermissible unapportioned direct tax. The Court reviewed its prior decisions in the area (see *id.* at 599-602) and concluded that "*direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." *Id.* at 602; see *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533, 544-546 (1869); *Scholey* v. *Rew*, 90 U.S. (23 Wall.) 331, 347-348 (1875). The EPACT assessment, even if regarded as a tax on the ownership of DOE-enriched uranium, clearly would not fall within either of those categories.

b. Subsequently, in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) (*Pollock I*), and in *Pollock II*, this Court articulated a somewhat more expansive conception of the "direct tax[es]" that are subject to the constitutional apportionment requirement. In *Pollock I*, the Court held that the Income Tax Act of 1894, ch. 349, 28 Stat. 509, was unconstitutional as applied to income derived from real property, on the ground that such a tax was indistinguishable for purposes of the Direct Tax Clauses from a tax levied on the real estate itself. 157 U.S. at 581. On rehearing in *Pollock II*, the Court held that the 1894 Act was also unconstitutional as applied to income derived from personal property. The Court concluded that the Direct Tax Clauses bar Congress from levying "a general unapportioned tax, imposed upon all property owners as a body for or in respect of their property." 158 U.S. at 627.

Even if the EPACT assessment were properly characterized as a tax on ownership of DOE-enriched uranium, it would be fully consistent with the rule announced in *Pollock II*. As the court of appeals in the instant case explained, "[t]hroughout the *Pollock II*

opinion the Court was careful to describe the income tax at issue as a general tax on the whole of an individual's personal property." Pet. App. 16a; see *id.* at 16a-17a (citing relevant passages from *Pollock II* opinion). Because the EPACT assessment "is not a general tax on the whole of one's personal property or even a tax on a broad class of personal property," *id.* at 19a, the decision in *Pollock II* provides no support for petitioner's contention that the assessment is a prohibited direct tax.[7]

In *Patton* v. *Brady*, 184 U.S. 608 (1902), decided just seven years after the *Pollock* cases, this Court held that an unapportioned federal tax on tobacco was a permissible excise rather than a direct tax. The Court did not (as petitioner contends, see Pet. 23) suggest that the tax was valid because it was imposed on the sale rather than the ownership of tobacco. Rather, while noting that the tax was "placed upon articles which 'were at the time of the passage of this act held and intended for sale,'" 184 U.S. at 623, the Court distinguished the *Pollock* decisions on the ground that the challenged tax was "not a tax upon property as such

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[7] In significant respects, this Court's decisions in *Pollock I* and *Pollock II* are no longer good law. The specific limitations announced by the Court on Congress's power to tax incomes were superseded by the Sixteenth Amendment. Quite apart from that Amendment, moreover, the proposition that a tax on income is constitutionally equivalent to a tax on the land from which the income is derived was later rejected in *New York ex rel. Cohn* v. *Graves*, 300 U.S. 308, 312-314 (1937). The Court in *Pollock I* also held that intergovernmental immunity barred Congress from taxing interest derived from state and municipal bonds. See 157 U.S. at 583-586. In *South Carolina* v. *Baker*, 485 U.S. 505, 524 (1988), this Court "confirm[ed] that subsequent case law has overruled the holding in *Pollock* that state bond interest is immune from a nondiscriminatory federal tax."

but upon certain kinds of property, having reference to their origin and their intended use," *id.* at 619. That same characterization would apply here, even if the EPACT assessment were properly regarded as a tax on enriched uranium. The assessment is not a tax on "property as such" (*ibid.*), and it is determined by reference both to the origin of the enriched uranium (since it is triggered by the purchase of SWUs "from the Department of Energy") and to its intended use (since the assessment applies only to SWUs purchased "for the purpose of commercial electricity generation"). 42 U.S.C. 2297g-1(c); see Pet. App. 22a.

c. Petitioner relies (see Pet. 16-17, 21-24) on dicta from various decisions suggesting a possible constitutional distinction between taxes on the "use" of specific personal property and taxes imposed solely on the basis of "ownership Petitioner identifies no case, however, in which this Court or any court of appeals has relied on that distinction in striking down a federal tax statute.[8]

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[8] Even assuming that *Eisner* v. *Macomber*, 252 U.S. 189 (1920), remains good law, petitioner's reliance (Pet. 14, 17) on that decision is misplaced. In *Eisner*, the Court struck down a federal tax imposed on a shareholder's receipt of a corporate stock dividend. See 252 U.S. at 200-201. The bulk of the Court's analysis addressed the question whether a stockholder's share of the corporations's profits was "income" within the meaning of the Sixteenth Amendment, and the Court concluded that it was not. See *id.* at 205-217. The tax at issue in *Eisner* was not imposed on specific personal property owned by the taxpayer; rather, the dividend represented an undifferentiated share of the total assets of the corporation. See *id.* at 219. *Eisner* therefore would not cast doubt on the constitutionality of a tax on enriched uranium, even if the EPACT assessment were properly so characterized.

This Court's decision in *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288 (1921) (see Pet. 22, 24), is also inapposite. That case involved a state rather than a federal tax and

There is consequently no basis for petitioner's contention that the court of appeals' reasoning in this case is contrary to a settled understanding of the coverage of the Direct Tax Clauses. In any event, the EPACT assessment is not based solely on the ownership of enriched uranium. Rather, it is imposed on utilities that have benefitted from DOE's enrichment services by purchasing SWUs from the agency for the purpose of generating electric power.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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accordingly presented no question under the Direct Tax Clauses. See 255 U.S. at 294-295; Pet. App. 12a-13a n.8.

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IN THE

Supreme Court of the United States

UNION ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

No. 03-1709

UNION ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The government acknowledges that the court below has adopted an interpretation of the "direct tax" clauses that conflicts with numerous decisions of this Court and of other courts of appeals. The government erroneously asserts, however, that those numerous prior decisions reflect only "dicta" that the court below was free to ignore. Br. In Opp. 13, 16. The government further errs in contending that the tax at issue in this case is not imposed on the "ownership" of property but is, instead, an excise imposed on "the prior receipt of benefits" from enriched uranium. Br. In Opp. 9. That contention is flatly inconsistent with the clear text of the statute, and it was not adopted or relied on by the court below.

Because the decision of the court of appeals conflicts with the decisions of this Court and other courts of appeals and, in doing so, broadly sanctions the imposition of unconstitutional federal property taxes that have an enormous fiscal effect, review of the unprecedented Federal Circuit decision in this case is warranted.

1. a. Although the court below acknowledged that a "general" federal property tax is proscribed by the "direct tax" clauses of the Constitution (U.S. Const. Art. I, § 2, cl. 3; U.S. Const. Art. I, § 9, cl. 4), the court nonetheless held that a federal tax imposed on the ownership of "only one particular kind of personal property" is *not* proscribed by the Constitution. Pet. App. 18a, 19a. For the reasons detailed in the petition, that strained conclusion cannot be reconciled with the broad and express restriction on direct federal taxation of property that is set forth *twice* in the Constitution. See Pet. 11-17. Moreover, the government now candidly acknowledges that, in numerous cases following *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), this Court and several courts of appeals have concluded that a federal tax imposed on the "ownership" of "specific personal property" (Br. In Opp. 16) violates the "direct tax" clauses of the Constitution. Without analyzing these cases in any detail, however, the government casually asserts that they represent nothing more than "dicta" that need not be followed. Br. In Opp. 13, 16. The government's unexamined description of this precedent is plainly incorrect.

In numerous contexts, this Court and the courts of appeals have consistently interpreted the proscriptions of the "direct tax" clauses to forbid the imposition of not only general property taxes but also of taxes on "one particular kind of personal property" or another. See Pet. 17-22 (citing cases). For example, in *Eisner* v. *Macomber*, 252 U.S. 189, 219 (1920), *Helvering* v. *Independent Life Ins. Co.*, 292 U.S. 371,

378-379 (1934), and *Billings* v. *United States*, 232 U.S. 261, 279 (1914), this Court applied the "direct tax" clauses to conclude that Congress could not impose a federal tax on the ownership of such discrete types of property as stock dividends (*Eisner*), the value of the owner-occupied part of a building (*Independent Life Ins. Co.*), and a yacht (*Billings*).[1] See also cases cited Pet. 14-17. Prior to the decision in this case, the government had also routinely "conceded" that it would be a violation of the "direct tax" clauses to impose "a tax on principal" amounts of promissory notes because a direct tax on such items of personal property would be invalid under "well settled principles." *Richardson* v. *United States*, 294 F.2d 593, 596 (6th Cir. 1961).

The court below failed to address or even acknowledge these numerous conflicting decisions. And, the only one of these decisions that is addressed in the government's brief is *Eisner* v. *Macomber*, *supra*, which the government incorrectly attempts to characterize (in a footnote) as a case that does little more than interpret the meaning of the term "income" in the Sixteenth Amendment. Br. In Opp. 16 n.8. In fact, however, in *Eisner*, this Court clearly and expressly held that a tax imposed on the value of a specific, particular kind of property (a stock dividend) is unconstitutional under the "direct tax" clauses and thus "contravenes the provisions of Article I, § 2, cl. 3, and Article I, § 9, cl. 4, of the Constitution." 252 U.S. at 534.[2]

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[1] In *Billings*, the government did not dispute that a tax on the mere ownership of property "would probably" be an impermissible direct tax; instead, the government argued that an excise tax "levied upon the use" of such property is permissible because it "is indirect in the constitutional sense." 232 U.S. at 271. See *Fernandez* v. *Wiener*, 326 U.S. 340, 362 (1945); Pet. 15.

[2] In *Eisner*, the Court first addressed whether the value of the stock dividend represented "income" because, if the tax were on

The government attempts to distinguish that plain holding of *Eisner* from the present case on the theory that the tax involved in *Eisner* "was not imposed on specific personal property owned by the taxpayer." Br. In Opp. 16 n.8. The government makes the untenable suggestion that a tax on a stock dividend should not be regarded as a tax on a "particular kind of personal property" because the dividend share of stock "represented an undifferentiated share of the total assets of the corporation." *Ibid.* The government's strained effort to distinguish the personal property involved in *Eisner* from the personal property involved in this case is manifestly illogical. A tax on the value of a share of stock is unquestionably a tax imposed on a "particular kind of personal property" within the ordinary meaning of those words, for such a limited exaction would plainly not be "a general tax on broad classes of personal property." Pet. App. 18a.

In rejecting the large body of precedent that has consistently interpreted and applied the "direct tax" clauses to proscribe federal taxes imposed both generally on all property and also on the ownership of "particular kinds" of property, the decision of the court below seeks to return to the view urged by Alexander Hamilton in the early case of *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796). See Pet. App. 12a. In *Pollock*, *Eisner* and subsequent decisions, however, this

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"income," it would have been permitted by the Sixteenth Amendment notwithstanding the "direct tax" clauses. See Pet. 14 n.11. The Court concluded in *Eisner* that the value of the stock dividend did not represent income and therefore reached the question whether the tax imposed on the value of that property was impermissible under the "direct tax" clauses. See 252 U.S. at 533-534. The holding under the "direct tax" clauses in *Eisner* has never been questioned by this Court or, prior to the decision in this case, by any other court.

Court clearly rejected the broad reading of *Hylton* that the court below has adopted. See Pet. 18-19. This Court has made clear that the decision in *Hylton* does *not* apply to cases that involve taxes on the ownership of property, and instead stands only for the proposition that "a tax imposed upon a particular *use* of property * * * is an excise which need not be apportioned." *Bromley* v. *McCaughn*, 280 U.S. 124, 136 (1929). See Pet. 14 n. 10 (citing cases); *id.* at 18-19. In the present case, the court of appeals failed to address the decisions that expressly reject the broad reading of *Hylton* now urged by the government. By doing so, the court failed to honor the decisions of this Court that clearly hold that a tax on property that "falls upon the owner merely because he is owner" is proscribed by the "direct tax" clauses of the Constitution. *Fernandez* v. *Wiener*, 326 U.S. 340, 362 (1945). See *United States* v. *Manufacturers National Bank*, 363 U.S. 194, 197-198 (1960).

b. The government does not dispute that the "direct tax" clauses were placed in the Constitution to protect the inherent, traditional authority of the States over direct taxation of persons and property and to restrict the federal government from such taxation to ensure that it is not "exercised unfairly and discriminatingly, as to particular States or otherwise." *Pollock*, 158 U.S. at 620. See Pet. 19-20, 25-26. The holding of the court of appeals in this case directly conflicts with this settled understanding of the object and purpose of the "direct tax" clauses.

The court below held that the federal government is free to tax any "particular type" of property without infringing this constitutional prohibition. Pet. App. 19a. A tax on any "particular kind" of property, however, quite obviously may burden some States more severely than others. For example, a tax on stock dividends, corporate bonds or pineapples would plainly have disparate regional effects. Indeed, the EPACT

assessment was opposed in the House of Representatives precisely on these grounds, for it imposes a "terribly unfair" burden on the "States that are more nuclear dependent." Hearings Before the House Committee on Ways and Means on the Comprehensive National Energy Policy Act, 102d Cong., 2d Sess. 79 (Apr. 28, 1992) (Serial 102-94). The holding of the court of appeals that the "direct tax" clauses do not proscribe a federal tax imposed on a "particular kind" of property" would thus squarely defeat the central objectives of these constitutional provisions. See Pet. 26.

2. The primary defense that the government now offers for the decision below is a theory that the court itself declined to adopt. The government's new theory is that the EPACT tax is not imposed on the "ownership" of property but is instead a retroactive excise tax imposed on "the prior receipt of benefits" from government-enriched uranium. Br. In Opp. 9. That new contention is contradicted by the text and structure of the statute and also by the decision of the court below.

a. In the first place, it bears emphasis that the government does not even attempt to defend the reasoning of the court of appeals on this issue. The court of appeals had suggested that the EPACT tax should be regarded as an excise tax that falls on "the purchase of * * * enriched uranium – as opposed to the ownership" of that property. Pet. App. 21a. The court's description of the tax, however, is plainly not correct.

While the statute initially purports to impose the tax on any party who "purchased" these materials from the government before October 24, 1992, it then further provides that a utility "shall not be considered to have purchased" the enriched uranium if it was "sold [by that utility] to another" utility prior to the assessment date of October 24, 1992. 42 U.S.C. 2297g-1(c), 2297g-1(c)(1), (2). By its plain terms, the tax thus does not apply to the purchase of enriched uranium;

instead, it is imposed on the utility that *owns* the uranium on the assessment date of October 24, 1992. Pet. 5-6 & n.5. As we explain in the petition, the obvious character of any direct tax that "falls upon the owner merely because he is the owner" (*Bromley* v. *McCaughn*, 280 U.S. at 138) is that it is assessed on individuals who (at some earlier time) acquired the property and who (as of the assessment date) still own it. Pet. 24. Nothing in the government's brief disputes that plain fact.[3]

b. The government instead claims that the EPACT tax should be regarded as a retroactive excise imposed on the "prior receipt of benefits" (Br. In Opp. 9) from the government-enriched uranium. That contention is incorrect and in conflict with the submissions of the United States in the prior constitutional litigation involving this same tax.

(i) The "benefits" that the utilities received from the enriched uranium that they purchased were paid for under the fixed price contracts between the utilities and the government. See Pet. 4. These utilities received no additional "benefits" from the fact that the government performed its uranium enrichment procedures in careless or inappropriate ways that resulted in needless and severe pollution. The government has therefore acknowledged – indeed, insisted – in prior litigation involving this tax that the EPACT assessment is *not* a retroactive fee for services provided but is instead a "general tax." And, in that prior litigation, the Federal Circuit

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[3] The government also makes no effort to defend the alternative reasoning of the court of appeals that the challenged tax should be treated as an "excise" simply because it is imposed on a "consumable" (Pet. App. 20a). The government does not dispute that, for the reasons detailed in the petition, this alternative holding of the court of appeals is both incorrect and in conflict with the decisions of this Court and other courts of appeals. See Pet. 22-23.

has upheld the government's claim that the EPACT assessment is a "general exercise of Congress's taxing power * * * rather than an act that retroactively increases the price charged to contracting parties." *Yankee Atomic Electric Co.* v. *United States*, 112 F.3d 1569, 1577 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998).

The government is necessarily bound by its affirmative representations in its prior successful litigation and may not now conveniently alter its theory to claim that the "general tax" imposed by the EPACT should instead be regarded as a "retroactive fee" or "excise" imposed on "the prior receipt of benefits" by the affected utilities. Presumably in recognition of the binding nature of the government's prior submissions in the related constitutional cases (see Pet. 7-8), the court below declined to adopt or even address the new and inconsistent theory advanced by the government in this case.

(ii) It is clear, in any event, that the EPACT assessment is *not* a fee or excise tax based on "the prior receipt of benefits." This tax does not apply *as* the enriched uranium is used and does not apply only to uranium that *is* used. The tax simply has nothing to do with whether or when the utility receives "benefits" from the uranium. Instead, the clear text of the statute specifies that the tax is imposed on the utility that had purchased the uranium, and not resold it to another utility, by the assessment date of October 24, 1992. See Pet. 5-6 & n.5. The utility that had purchased the uranium and not resold it by the assessment date is the utility that owned the uranium *on* the assessment date. The tax is thus squarely imposed on the "ownership" of this property, not on the "receipt of benefits" from it.[4] Indeed, the court of appeals ultimately

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[4] The *amount* of the tax imposed on each utility is also calculated by the amount of enriched uranium that the utility had purchased and not resold – regardless whether the utility had used

accepted this simple truth by acknowledging that "the tax [at issue in this case is] *on the ownership* of government-enriched uranium purchased directly or indirectly from the government." Pet. App. 24a (emphasis added).

c. The government also errs in attempting to ascribe some constitutional significance to the fact that the EPACT assessment applies only to the ownership of government-enriched uranium and not to enriched uranium obtained from "different suppliers" (Br. In Opp. 11). A federal property tax that is imposed on government bonds, and not on private bonds, would still be a tax imposed on "property – which Congress cannot exact without apportionment." *United States* v. *Manufacturers National Bank*, 363 U.S. at 197-198.

3. The government does not contend that the constitutional question presented in this case lacks substantial recurring importance. If, as the court below concluded, Congress is free to impose direct property taxes on the ownership of any "particular kind" or distinct type of property (such as shares of stock, or bonds, or bank accounts, or personal residences), the express limitation on direct federal taxation that the Founders placed in the Constitution would

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or otherwise "received benefits" from that uranium prior to the assessment date. As respondent notes, it is possible that *some* of the enrichment values of the uranium may have been used prior to the assessment date, but the tax is clearly not based on the amount of (or even the existence of) such depletion. Instead, the tax falls on a utility based solely on the fact that the utility had purchased enriched uranium and not resold it as of the assessment date. As to the property thus retained by the utility on the assessment date, the tax impermissibly "falls upon the owner merely because he is owner" (*Fernandez* v. *Wiener*, 326 U.S. 340, 362 (1945)) and therefore violates the "direct tax" clauses of the Constitution. *Bromley* v. *McCaughn*, 280 U.S. at 137; *Eisner* v. *Macomber*, 252 U.S. at 205, 219.

have no meaning or effect. See Pet. 25-27. Under the government's submission, the United States would be free to impose direct property taxes that overlap and interfere with the essential, retained taxing powers of the States. This Court has plainly concluded, however, that the central purpose of the "direct tax" clauses was to prohibit the very sort of federal interference with powers of state taxation that the decision in this case permits. See *Pollock*, 158 U.S. at 621; Pet. 20.

By depriving the "direct tax" clauses of their intended role in the constitutional scheme, the decision of the court of appeals would effect a radical restructuring of the longstanding limitations on the federal tax power. Because the decision in this case broadly sanctions the imposition of unconstitutional federal property taxes, and thereby upsets fundamental limitations on the federal taxing power, review by this Court is warranted.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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